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88-452

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in accepting and relying upon findings of fact and conclusions of law entered by the District Court after a proper notice of appeal had divested the District Court of jurisdiction, contrary to the holdings of this Court and the Third, Fifth, and Seventh Circuits?

2. May a District Court prohibit a party—by enforcing a stipulated umbrella protective order, barring the public and press from the courtroom, and refusing to unseal the trial record and exhibits until after its decision in the case—from presenting to a federal regulatory agency evidence—later found by the agency to be true—that the other party had perpetrated a fraud on the agency?

PARTIES TO THE PROCEEDINGS

Petitioner Tenneco Oil Company is wholly-owned by Tenneco Corporation, which is wholly-owned by Tennessee Gas Pipeline Company, which in turn is wholly owned by Tenneco Inc. Pursuant to Rule 28.1, a complete listing of all subsidiaries and affiliates of Tenneco Inc. appears at Appendix M. Tenneco Oil Company was defendant-counterclaimant in the District Court and appellant in the Court of Appeals. Respondent Kern Oil & Refining Company was plaintiff-counterdefendant in the District Court and appellee in the Court of Appeals.

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KERN OIL & REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Tenneco Oil Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on March 7, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 840 F.2d 730 and is reprinted in the appendix hereto ("App.") at 1a. The various opinions of the District Court are unreported and are reprinted at App. 24a, 28a, 31a, 39a, 46a, and 53a.

JURISDICTION

The District Court entered judgment against petitioner on November 5, 1986. App. 50a. Petitioner filed a notice of appeal on November 21, 1986. *See* App. 6a. Three days later, on November 24, 1986, the District Court entered its findings of fact and conclusions of law. App.

53a, 81a. The Court of Appeals affirmed on March 7, 1988, App. 1a, and denied a timely-filed petition for rehearing on May 19, 1988. App. 22a. On August 3, 1988, Justice O'Connor entered an order extending the time to file a petition for certiorari to and including September 16, 1988. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION AND RULES

The pertinent parts of the First Amendment to the United States Constitution and Fed. R. Civ. P. 26(c), 52, and 59 are set forth at App. 87a.

STATEMENT OF THE CASE

In May 1977, Tenneco Oil Company ("Tenneco") and a predecessor to Kern Oil & Refining Company ("Kern") entered into a contract under which Tenneco agreed to sell and Kern agreed to purchase oil produced by Tenneco from the Yowlumne oil field in California. The parties soon came to disagree over the requirements of the contract and of applicable regulations issued by the Department of Energy ("DOE"). Kern responded by filing three lawsuits in United States District Court for the Central District of California, the last two of which are the subject of this petition.[1]

In one of these—filed in July 1981—Kern alleged that Tenneco violated DOE regulations. In the other—a diversity action filed in December 1982—Kern relied on the same acts to allege a breach of the contract. The District Court consolidated these two actions. In essence, Kern's claim in the two suits was that Tenneco violated

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[1] The first suit—filed in February 1981—concerned the *price* of the oil subject to the contract. It proceeded independently of the suits at issue in this case, which concern the *supply* of oil under the contract. *Kern Oil & Refining Co.* v. *Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987).

DOE regulations and the 1977 contract by failing to supply Kern with *all* of the oil produced from the Yowlumne field. Tenneco contended that Kern was in fact unable to accept all of the oil due to limits on its refining capacity, and that Kern knowingly redelivered excess oil to Tenneco under a separate 1978 contract.

During the pertinent time period, the DOE entitlements program—designed to equalize the cost of "price controlled" and "uncontrolled" oil to refiners—was in effect. Refiners were required to purchase an "entitlement" to refine "price controlled" oil and to report, under oath, the number of price controlled barrels refined each month. *See* Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.1-.71 (1979). Instead, during the damage period, Kern systematically refined price controlled oil but reported to DOE that it was refining uncontrolled oil. It did not purchase entitlements on such oil.

The operation of this program was directly pertinent to Kern's damage claim, in that the cost of entitlements increased the cost of oil to Kern so substantially that Kern would not have rationally purchased and refined the additional price controlled oil it was claiming from Tenneco. Removing the price controlled barrels from Kern's damage claim would have reduced its damages by more than $6 million.

In early 1985, during the course of discovery, Tenneco uncovered documents demonstrating that Kern had defrauded DOE by evading its obligations to purchase entitlements on the price controlled oil it refined. Tenneco promptly moved in the District Court, on April 18, 1985, for leave to disclose these documents to DOE. Such leave was necessary because the parties had stipulated at the outset of discovery to a routine umbrella protective order, covering all documents and information obtained through discovery. App. 83a.

The District Court, in September 1985, ordered Kern to show "good cause" under Fed. R. Civ. P. 26(c) as to why disclosure of the specified documents should not be permitted. App. 25a. As the District Court itself noted, however, "Kern elected not to make its showing of good cause." App. 25a. Instead, Kern argued that Tenneco should be bound by the umbrella protective order even in the absence of good cause. App. 26a. One month later, on October 11, 1985, the District Court expressly found that "Kern has failed to demonstrate good cause why the disclosure of Exhibits B, D, G, E (apart from those documents listed in Exhibit B to Tenneco's Second Supplemental Memorandum) and F (as revised) should not be permitted * * *." App. 29a. Despite the absence of "good cause," the court nonetheless barred Tenneco from turning the documents over to DOE on the grounds that Tenneco was "bound by th[e] agreement" and that permitting disclosure "can only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved." App. 27a, 29a.

During the trial, the District Court closed the courtroom and evicted members of the public when the issue of Kern's fraud arose. The transcript reveals the following:

> Mr. Sherwood [counsel for Kern]: [W]e would request that the proceedings insofar as there be testimony on that subject be closed, and that the transcript be sealed pending further order of the Court.
>
> The Court: All right. Proceedings closed. Now, what do you mean by that?
>
> Mr. Sherwood: Well, we, as you may recall, resisted the effort on the part of Tenneco to turn over discovery materials to the DOE. We wish to make sure that at least pending further order of the Court, that insofar as these matters are presented in open court either by testimony or by exhibit, that those not be available for disclosure to anybody else, and that the public, who may or may not have an exotic

interest in the subject, be excluded from the courtroom.

The Court: Well, that's consistent with my order, and I think that order should continue.

* * * *

Proceedings will be closed. In light of that, I'm going to ask you to excuse yourselves. Thank you. [Ct. App. Excerpts of Record, at 1896-98.]

The documents Tenneco wished to disclose to DOE were then admitted into evidence in secrecy, and kept under seal. On July 2, 1986, after the trial had concluded, Tenneco moved yet again to unseal the trial record and exhibits, so that it could reveal Kern's fraud to DOE. *Id.* at 963.

On August 28, 1986—still without having ruled on Tenneco's post-trial disclosure motion—the District Court issued a decision on the merits, concluding that Kern was entitled to collect from Tenneco some $32 million in damages, interest, and attorneys' fees. App. 39a. In calculating damages, the court rejected Tenneco's argument based on the documents that Tenneco was barred from showing to DOE, stating that Kern's conduct "was not violative of federal regulations" and that "the Department of Energy made an audit of entitlements compliance * * * and found Kern to be in compliance." App. 43a. DOE itself, of course, had not yet had *any* opportunity to address the question, since the District Court had forbidden Tenneco from presenting its evidence of Kern's fraud to DOE, had closed the courtroom to prevent disclosure of the evidence, and had yet to rule on Tenneco's post-trial motion to unseal the record. The court's Memorandum concluded by directing counsel for Kern to prepare findings of fact and conclusions of law, as well as a judgment. App. 45a.

On September 19, 1986, in response to a mandamus petition filed by Tenneco, the Court of Appeals for the

Ninth Circuit in effect suggested that the District Court rule on Tenneco's post-trial disclosure motion within 14 days. On September 25, 1986, the District Court issued an Order on the motion. The Order recognized the conflict in the Circuits over the First Amendment right of access to records in a civil case, and noted that "this issue has not been addressed by either the Ninth Circuit or the Supreme Court." App. 47a. The court granted Tenneco's motion for reasons that confirmed the grounds on which it had earlier barred disclosure and closed the courtroom:

> Because this matter has now been tried, presentation by Tenneco of the documents at issue to the DOE will not delay proceedings before this Court. Moreover, when ruling on Tenneco's original motion for disclosure, *this Court found that Kern had failed to demonstrate good cause* as to why the documents should remain under seal. The Court now reaffirms this finding. * * * There being no good cause for the maintenance of the protective orders, those orders are vacated insofar as they pertain to trial exhibits received into evidence and to the trial transcript. [App. 48a (emphasis supplied).]

The court stayed its Order until October 3, 1986, and Kern—relentlessly attempting to block disclosure of its documents to DOE—sought a stay from the Ninth Circuit and this Court. Both efforts failed and, on October 3—eighteen months after seeking permission to contact DOE—Tenneco was finally permitted to present the evidence of Kern's fraud to DOE. That agency immediately opened an investigation of Kern, and on March 31, 1987, issued a Proposed Remedial Order seeking $60 million from Kern due to its fraud during the damage period.

The DOE order specified that Kern "reduced its post-entitlements cost of crude oil below that which it would have incurred if it had properly reported its controlled tier crude oil receipts to the Entitlements Program," that

transactions reported by Kern "never really took place" and "were designed, in fact, 'for the purpose of camouflaging the real deal' from the DOE," and that Kern "unlawfully evaded its obligations under the Entitlements Program." [2]

The disclosure and its resulting action by DOE, however, came too late to affect proceedings in the District Court. On November 5, 1986, that court entered its judgment against Tenneco. App. 50a. Tenneco filed its notice of appeal on November 21, 1986.[3] Three days *after* Tenneco's notice of appeal—on November 24, 1986—the District Court entered the findings of fact and conclusions of law required under Fed. R. Civ. P. 52.

The Court of Appeals affirmed, rejecting Tenneco's argument that the notice of appeal divested the District Court of jurisdiction to enter findings of fact and conclusions of law. According to the Ninth Circuit, "divestiture of district court jurisdiction does not rest on a statute" but is rather a " 'judge-made doctrine' " that may be departed from on a case-by-case basis.[4] The court held that Tenneco "suffered no harm by the late filing," rejecting Tenneco's argument that the District Court's be-

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[2] Ct. App. Excerpts of Record, at 3771, 3777. As required by law, 10 C.F.R. § 205.192(d), the Proposed Remedial Order was accompanied by a declaration of the DOE employee primarily knowledgeable about the case that "to the best of my knowledge and belief, the findings of fact are correct." Ct. App. Excerpts of Record, at 3785. Kern has sought review of the Proposed Remedial Order.

[3] Since the District Court's unitary judgment included a claim within the exclusive jurisdiction of the Temporary Emergency Court of Appeals ("TECA"), Tenneco noted an appeal to that court as well as the Ninth Circuit. Proceedings before TECA were stayed pending decision by the Ninth Circuit. On August 15, 1988, TECA issued an order setting forth a briefing schedule, with briefing to be complete by September 23, 1988.

[4] App. 6a (quoting 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11, at 3-45 n.1 (2d ed. 1987)).

lated entry of its findings and conclusions deprived Tenneco of any opportunity to move for amended findings and conclusions under Fed. R. Civ. P. 52(b) and 59(a). According to the Court of Appeals, permitting Tenneco to file such motions "would be pointless." App. 7a.

The Ninth Circuit also rejected Tenneco's claim that the District Court erred when it barred Tenneco from presenting the evidence of Kern's fraud to DOE in a timely manner. Kern had supported its damage claims at trial by arguing that it would have refined additional price controlled oil from Tenneco. Now that the Kern documents had at last been revealed to DOE, however, the same Kern officials were taking the exact opposite position in seeking to overturn the DOE Proposed Remedial Order. Kern was now arguing before DOE that the cost of entitlements made price controlled oil too expensive to refine and that it would *not* have refined any additional price controlled Tenneco oil. *See* App. 17a.

Tenneco contended before the Ninth Circuit that, had it been able to reveal the documents to DOE in a timely fashion, Kern would not have been able to take such inconsistent positions, and the District Court could have considered DOE's findings—not just Tenneco's arguments —in assessing Kern's damage claims. The Court of Appeals, however, stated that the fact "[t]hat Kern is now arguing a different theory to a different tribunal certainly weakens its new position, but does not make the district court's earlier conclusion clearly unsupported by the evidence." App. 17a.

REASONS FOR GRANTING THE WRIT

I. The District Court Lacked Jurisdiction To Enter Findings Of Fact And Conclusions Of Law After The Filing Of A Notice Of Appeal

This Court recently held that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 376, 379 (1985). Other Circuits have also recognized that "upon the filing of the notice of appeal the district court loses its power to take any further action in the proceeding except in aid of the appeal, to correct clerical mistakes under Fed. R. Civ. P. 60(a), or in aid of execution of a judgment that has not been stayed or superseded." [5] The court below crafted another exception to this fundamental principle of appellate jurisdiction. It permitted the District Court to enter findings of fact and conclusions of law *after* a proper notice of appeal had divested that court of jurisdiction. Although "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," *Griggs*, 459 U.S. at 58, that is precisely the result sanctioned by the court below in this case.

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[5] *Henry* v. *Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986). *See, e.g., Nicol* v. *Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984); *Rucker* v. *U.S. Dept. of Labor*, 798 F.2d 891, 892 (6th Cir. 1986); *Venen* v. *Sweet*, 758 F.2d 117, 120 (3d Cir. 1985); *Garcia* v. *Burlington Northern R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987). *See also* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3949, at 359 (1977) ("So complete is this transfer of jurisdiction that any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal").

This Court long ago recognized the inherent prejudice in permitting findings and conclusions to be entered after an appeal has been taken from the underlying judgment. *Generes* v. *Bonnemer*, 74 U.S. (7 Wall.) 564 (1869).[6] Tenneco was left without hearing and without remedy with respect to the findings and conclusions belatedly entered by the District Court after the notice of appeal. Although Rules 52(b) and 59(a) expressly provide a means to correct erroneous findings or judgments, the time to file such motions expired before the court even entered its findings.

The Ninth Circuit justified its new exception on the ground that adhering to the rule would result in "needless paper shuffling." App. 6a. The rule reiterated by this Court in *Griggs*, however, is not a matter of discretion, depending on the particular facts of each case. The filing of a notice of appeal is an event of "jurisdictional significance," *Griggs*, 459 U.S. at 58, not simply a factor to be considered in efficient docket control. As this Court emphasized last Term, rules concerning the allocation of jurisdiction between trial and appellate courts "should above all be clear." This is an area in which "[c]ourts and litigants are best served by * * * bright-line rule[s]" rather than case-by-case analysis of the sort engaged in below. *Budinich* v. *Becton Dickinson & Co.*, 108 S. Ct. 1717, 1722 (1988).[7]

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[6] There, a unanimous Court noted:

> To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy. [*Id.* at 565. *Accord Avendano* v. *Gay*, 75 U.S. (8 Wall.) 376 (1869).]

[7] *See Christianson* v. *Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) (adhering to "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists," despite recognition that such adherence would create

Other Circuits have recognized the "jurisdictional significance" of a notice of appeal, repeatedly confirming that a District Court lacks authority to act after a proper notice of appeal, regardless of any apparent wastefulness caused by adherence to this rule. Thus, in *Ced's Inc.* v. *EPA*, 745 F.2d 1092 (7th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), the Seventh Circuit held that the trial court was wholly without jurisdiction, no matter what the motivation, to issue additional grounds supporting its ruling after a notice of appeal had been filed. *Id.* at 1095. In *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1326 (5th Cir. 1985), the Fifth Circuit concluded that the District Court lacked jurisdiction to enter an "order supplementing judgment" after filing of the notice of appeal, even though the order only clarified that certain plaintiffs were minors represented by their parents. And in *Philadelphia Marine Trade Ass'n* v. *International Longshoremen's Ass'n, Local 1291*, 365 F.2d 295, 300 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967), the Third Circuit rejected a complaint that the District Court failed to make findings of fact and conclusions of law, noting that the fact that the other party had filed a proper notice of appeal "precluded the trial Court from entering findings of fact and conclusions of law even if they were required in this instance."

This question was hotly debated in the course of the famous aluminum antitrust litigation, which culminated in a final decision by the three senior judges of the Second Circuit when a quorum of this Court was not avail-

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wastefulness); *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988) (strict adherence to jurisdictional rule regarding naming of parties taking appeal; rejecting argument that Court "should apply 'harmless error' analysis to defects in a notice of appeal. This argument misunderstands the nature of a jurisdictional requirement").

able.[8] The trial judge in that case had delivered an oral opinion announcing his intent to dismiss the Government's action. The Government thereupon urged the court to enter judgment immediately without waiting for the formal findings and conclusions required under Rule 52, in order "to enable it to get the case into the Supreme Court at the earliest possible moment." *United States* v. *Aluminum Company of America*, 2 F.R.D. 224, 236 (S.D.N.Y. 1941). The court refused to do so, noting that the Government's planned immediate appeal would divest the trial court of any jurisdiction to enter the required findings:

> If a final order were entered and an appeal therefrom perfected, * * * clearly the jurisdiction of this court to make findings would thereupon be at an end. * * * I think that the Supreme Court has gone further; it has specifically ruled, or at least strongly indicated, that making findings is one of the things as to which jurisdiction is terminated by an appeal being perfected. [Id.]

The leading authority to the contrary is *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972). There, the trial court issued an opinion some four months after the notice of appeal and two days before oral argument of the appeal. The appellant argued that the notice had divested the District Court of jurisdiction, but the Court of Appeals disagreed, noting that the District Court's "amplified views are of great aid in this appeal." *Id.* at 1178. This ruling, we submit, was in error.

More recently, the court in *Under Sea Industries, Inc.* v. *Dacor Corp.*, 833 F.2d 1551, 1555-59 (Fed. Cir. 1987), ruled that findings and conclusions entered by the District Court two months after a proper notice of appeal from the judgment were "valid," and the appellate court

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[8] *United States* v. *Aluminum Company of America*, 322 U.S. 716 (1944), *certified and transferred*, 148 F.2d 416 (2d Cir. 1945).

relied extensively upon those findings in affirming the judgment. The court's action in doing so, however, illustrates the inevitable practical problems. The appellant in *Under Sea*, confronted with entry of the District Court's findings and conclusions two months after his appeal, quite naturally filed a second notice of appeal from the findings and conclusions. The Federal Circuit —although it relied heavily on the belated findings and conclusions—nonetheless dismissed the appeal from those findings and conclusions, noting that an appeal is proper only from a judgment. *Id.* at 1555-56.[9]

Judge Posner recently took note of this conflict, writing in response to a trial judge's practice of deciding bankruptcy cases orally but writing an opinion should the losing party appeal. *Matter of Jones*, 768 F.2d 923, 930-932 (7th Cir. 1985) (concurring opinion). Judge Posner remarked that

> the practice raises a number of serious questions, of which the most fundamental is whether it is authorized by law. The filing of the notice of appeal from a final judgment ordinarily divests the district court of jurisdiction over the case and shifts it to the court of appeals * * *. [*Id.* at 930.]

Noting the conflict on the question, Judge Posner concluded that acceptance of such an exception "would on balance impede rather than facilitate the appellate process." *Id.* at 931. In particular, he noted that the prac-

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[9] Indeed, the Federal Circuit, shortly after *Under Sea*, expressed its discomfort with the filing of findings and conclusions after notice of appeal. In *Hybritech Inc.* v. *Abbott Laboratories*, 849 F.2d 1446, 1450 (Fed. Cir. 1988), the court grudgingly upheld the practice once again, but cautioned that "[w]e * * * cannot condone, in all cases, the procedure followed by the district court judge in this case." The court stated that it was preferable for the trial court to refrain from entering an appealable order until *after* entry of findings and conclusions. The contrary practice—endorsed by the Ninth Circuit in this case—"can lead to wasted effort both by the litigants and by the court." *Id.* at 1451.

tice can "throw[] off the appellate timetable" and "converts the opinion-writing process from exploration to rationalization." *Id.* at 932.

The court below relied upon its own *ad hoc* view of convenience and efficiency in creating an exception to the *Griggs* rule. Other Circuits, however, have recognized the danger in creating jurisdictional exceptions on that basis. In *Venen* v. *Sweet*, *supra*, the District Court denied a motion to dismiss based on judicial immunity, and the defendant appealed. The District Court thereafter reconsidered and dismissed the complaint on grounds of immunity, and the *plaintiff* appealed. The Third Circuit, relying on *Griggs*, held that the District Court had been divested of jurisdiction by the first appeal, stressing that "'[d]ivest' means what it says" and that "jurisdictional requirements may not be disregarded for convenience sake." 758 F.2d at 120-121, 123. It vacated the post-notice order and dismissed the second appeal, even though this course would necessarily result in further proceedings.

In *Henry* v. *Farmer City State Bank*, 808 F.2d at 1240-41, the Seventh Circuit held that a District Court was without jurisdiction to enjoin state court litigation commenced by plaintiffs, whose parallel claims were thrown out of federal court, after the plaintiffs had appealed the dismissal. Even though the defendants had to defend themselves "against litigation which at this point appears to be without merit" and could refile their motion for an injunction when the case returned to the District Court, the Court of Appeals nonetheless properly enforced the jurisdictional rule.

In *Gormong* v. *Local Union 613, IBEW*, 714 F.2d 1109 (11th Cir. 1983), the District Court granted plaintiffs' motion to dismiss without prejudice, but the clerk erroneously entered judgment on the merits against plaintiff. The plaintiff filed a notice of appeal and, four days later,

the District Court *sua sponte* vacated the judgment. Although there was no question concerning the proper disposition of the case, the Court of Appeals properly refused to give effect to the District Court's post-notice order. Instead, the Court of Appeals engaged in what the Ninth Circuit might dismiss as "needless paper shuffling," sending the case back to the District Court to enter a proper order.[10]

There is no "harmless error" rule when it comes to jurisdiction. *See Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. at 2409 n.3; *Christianson* v. *Colt Indus. Operating Corp.*, 108 S. Ct. at 2178. The Federal Rules contemplate that erroneous findings and conclusions will be corrected *prior* to appeal; that is why Rules 52(b) and 59(a) authorize a District Court, upon motion of a party within ten days after entry of judgment, to amend or make new findings. Tenneco lost its opportunity under these Rules to challenge the findings and conclusions entered by the District Court, because they were entered three days *after* the notice of appeal rather than within ten days of the judgment. Tenneco's time to challenge the findings and conclusions expired before they were even entered.

This lost opportunity was not, as the Court of Appeals said, "pointless." App. 7a. In considering the merits of the contract dispute between the parties, the Ninth Circuit twice rejected arguments urged by Tenneco because they were not raised below. Tenneco in fact intended and was prepared to raise these arguments in the appro-

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[10] *Id.* at 1110. Even the Circuit that spawned *Silverthorne* has recognized the proper force of jurisdictional rules on other occasions. *See, e.g., Kirtland* v. *J. Ray McDermott & Co.*, 568 F.2d 1166, 1170 (5th Cir. 1978), in which the court rejected the contention that "it is undesirable, indeed a mere technicality, to dismiss the appeal and require the parties to make an unnecessary round trip to the trial court." This disturbing lack of uniformity is particularly unsettling with respect to jurisdictional rules.

priate post-trial motions it was barred from filing by the District Court's delinquent entry of findings and conclusions. In addition, by the time the findings and conclusions were entered, Tenneco had at last been permitted to present its evidence of Kern's fraud to DOE, and DOE had promptly opened an investigation of Kern. DOE's complaint against Kern came shortly thereafter. Had the matter been pending before the District Court at that time—due to post-trial motions by Tenneco—we can only assume that the District Court would have altered its findings and conclusions in the face of the directly contrary views of DOE and the directly contrary evidence now presented by Kern's own witnesses.

II. The Courts Below Violated The First Amendment, Rule 26(c), And Public Policy By Barring Tenneco From Presenting The Evidence Of Kern's Fraud To The Appropriate Federal Regulatory Agency

The District Court enforced a prior restraint on freedom of speech by prohibiting Tenneco from presenting documentary evidence of Kern's fraud on DOE to that agency, despite the express absence of "good cause" under Rule 26(c) to bar disclosure. Tenneco moved for permission to disclose the evidence of wrongdoing *eight months* before the start of trial. The trial court's failure to permit disclosure on the ground that it might delay trial—and its extreme steps of closing the courtroom to the press and public, and sealing the trial record and exhibits—contravened Tenneco's First Amendment rights, as well as Rule 26(c) and public policy.

Tenneco was directly harmed by the District Court's gag order. The concealment of Kern's fraud on DOE permitted Kern to argue at trial that it would have refined oil allegedly withheld by Tenneco. The District Court accepted this argument, increasing Kern's alleged damages. Now that the evidence shielded by the District Court has at last been revealed to DOE, Kern is arguing the opposite of what it argued before the District Court.

See App. 17a. Had Tenneco been permitted to reveal its evidence to DOE in a timely fashion, Kern would have been put to the choice before trial. At the very least, its inconsistent positions—and the fact that DOE agreed with Tenneco—would have refuted its argument before the District Court.[11]

A. The Decision Below Conflicts With This Court's Decision In *Seattle Times*

Four years ago, this Court addressed the relationship between civil discovery and the First Amendment in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984). That case arose out of a defamation action brought by members of a religious sect. In the course of discovery, the defendant publications requested production of the donor lists of plaintiffs' sect. The plaintiffs—fearing that publication of the lists by the media defendants would result in harassment of the donors—moved for a protective order, restricting defendants' use of the information to trial preparation only. The trial court entered the protective order and was upheld by the state Supreme Court.

This Court affirmed. Because the First Amendment protects information acquired through discovery, the Court demanded that any restraint on the dissemination

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[11] Tenneco's disclosure argument was extensively briefed and argued before the District Court, *see* Ct. App. Excerpts of Record, at 603, 607, 647, 679, 715, 746, 766, 821, 911, 955, 963, 1002, 1024, 1077, clearly decided by that court, *see* App. 24a, 28a, 46a, and raised and briefed before the Court of Appeals. *See* Appellant's Br. at 1, 4-5, 38-42, 59, Reply Br. at 19. The Ninth Circuit obliquely stated that Tenneco did not discuss the First Amendment. App. 16a n.10. As noted, that statement is untrue and, in any event, the Court of Appeals decided the disclosure claim, rejecting Tenneco's argument that it was harmed because the District Court "did not allow it to reveal [the] documents to the DOE until after the trial * * *." App. 16a. The disclosure issue, as developed below, hinges not only on the First Amendment but Fed. R. Civ. P. 26(c), common law, considerations of judicial administration, and public policy as well. It was properly raised and preserved below.

of that information both further " 'an important or substantial governmental interest unrelated to the suppression of expression' " and restrict First Amendment freedoms no more than " 'necessary or essential to the protection of the particular governmental interest involved.' " *Id.* at 32 (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)). In the case before it the Court identified the prevention of discovery abuse in general and protection of the plaintiffs' rights of privacy and religious association in particular as substantial government interests, and concluded that a proper protective order could promote these interests consistent with the First Amendment. 467 U.S. at 34-35, 37 & n.24. The Court held that where "a protective order is entered *on a showing of good cause as required by Rule 26(c)*, is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37 (emphasis supplied).[12]

As this Court emphasized, the First Amendment is not offended when dissemination of discovery material is limited under a protective order "entered on a showing of good cause." *Id.* at 37. Here, the District Court enforced a prior restraint on Tenneco after expressly finding that "Kern has failed to demonstrate good cause why the disclosure * * * should not be permitted." App. 29a;

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[12] State rule 26(c) at issue in *Seattle Times* was the same as Fed. R. Civ. P. 26(c). Justice Brennan, joined by Justice Marshall, concurred, noting that "[t]he Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." 467 U.S. at 37. The concurring Justices "agree[d] that the [plaintiffs'] interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment." *Id.* at 38. No similar interests, of course, are implicated in this case.

see App. 48a. The decision below thus conflicts sharply with this Court's opinion in *Seattle Times*.

It also conflicts on this score with the Second Circuit's recent decision in *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir.), *cert. denied*, 108 S. Ct. 344 (1987). The court there upheld the lifting of a blanket protective order:

> A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, *i.e.*, if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public inspection. [821 F.2d at 145.]

The court noted that this conclusion was "implicit" in *Seattle Times*. *Id.*

Since *Seattle Times*, the Circuits have not agreed on the appropriate application of that decision. Some Circuits have held that First Amendment considerations have no independent significance in the discovery process, and that the only question is the existence of "good cause" under Rule 26(c).[13] The Third Circuit has gone so far as to conclude that *Seattle Times* "confirmed" its

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[13] *See, e.g., In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987) ("sole criterion for determining the validity of a protective order is the statutory requirement of 'good cause' "); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (*"Cipollone I"*) (*Seattle Times* "prohibits a court considering a protective order from concerning itself with first amendment considerations"); *Tavoulareas* v. *Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (*en banc*) (assuming good cause, "the First Amendment does not require a court to apply especially close scrutiny in deciding whether to give parties to a civil litigation * * * a right to disseminate information gained through the pre-trial discovery process. Proper application of the good cause requirement * * * [is] a sufficient safeguard"), *cert. denied*, 108 S. Ct. 200 (1987).

view that " 'parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes.' " [14] The First Circuit, in contrast, has expressly noted that "[w]e do not agree with [the Third Circuit's] interpretation," ruling instead that *Seattle Times*

> means that first amendment considerations cannot be ignored in reviewing discovery protective orders. Although the "strict and heightened" scrutiny tests no longer apply, the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause. [*Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).]

Regardless of the approach, however, every Circuit to address the question—other than the court below—has at least insisted on the required showing of "good cause" under Rule 26(c). And while the lower courts have not settled on a uniform standard to measure "good cause," *see Cipollone I*, 785 F.2d at 1121 ("there appears to be a lurking dispute as to what may constitute good cause for a protective order"), even those Circuits holding that the First Amendment has no independent significance in this context have—perhaps because of that ruling—set a high standard for "good cause." The Third Circuit, for example, has held that

> the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. [*Id.*]

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[14] *New York* v. *United States Metals Refining Co.*, 771 F.2d 796, 802 (3d Cir. 1985) (quoting *Rodgers* v. *United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976)).

The First Circuit similarly insists upon a "particular factual demonstration of potential harm." *Cryovac*, 805 F.2d at 7.[15]

Here, the District Court expressly found that Kern had failed to carry its burden of establishing "good cause," let alone establish it with particularized and specific demonstrations of fact. Undaunted by this lack of showing, however, the court nevertheless denied Tenneco's disclosure motion, on the basis of unsupported speculation that disclosure could "only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved." App. 29a.[16]

Whatever showing satisfies the "good cause" standard, unfounded speculations of possible administrative inconvenience to the court cannot suffice.[17] The Third Circuit so held in *Cipollone* v. *Liggett Group, Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, 108 S. Ct. 487 (1987) (*"Cipollone II"*). In *Cipollone I*, *supra*, the court directed the

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[15] *See CBS, Inc.* v. *United States District Court*, 765 F.2d 823, 825 (9th Cir. 1985), in which then-Judge Kennedy stated for the court, in the context of a third-party request for documents filed in a post-conviction proceeding, that "[t]he interest which overrides the presumption of open procedures must be specified with particularity, and there must be findings that the closure remedy is narrowly confined to protect that interest."

[16] This reason rose up *sua sponte* from the court; after nearly five months of ordered briefings on the motion, not even Kern contended that the spectre of additional delay could meet the good cause standard for Rule 26 and First Amendment purposes.

[17] *See United States* v. *GAF Corp.*, 596 F.2d 10, 15 (2d Cir. 1979) (granting government access to discovery fruits of private litigation, noting, "[n]or are we impressed with the vague suggestion that if the Government obtains copies of documents during the course of litigation, that will somehow obstruct the management of the private litigation"); *Newman* v. *Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (rejecting concern over impact on docket as justification for denying access to judicial records and hearings).

District Court on remand to consider whether good cause existed for an umbrella protective order, previously entered by a magistrate solely on the basis of case management concerns. *See* 822 F.2d at 342. The District Court on remand held that such concerns could not constitute "good cause", noting that under Rule 26(c) "the focus is on injury to a specific individual, not on general concerns of case administration." 113 F.R.D. 86, 92 (D.N.J. 1986) (quoted in 822 F.2d at 342). The Third Circuit agreed, concluding that the appropriate inquiry is "focused upon the issue of particular need for *party* protection, not upon general concerns of trial efficiency." 822 F.2d at 343 (emphasis in original). Here, the District Court expressly found that Kern—the party seeking protection—failed to establish good cause, and instead the court relied upon "concerns of trial efficiency" in barring disclosure.

B. The Decision Below Conflicts With Decisions From The Third, Sixth, Seventh, And Eleventh Circuits On The Implications Of Umbrella Protective Orders

The District Court also relied upon the umbrella protective order entered into by the parties at the outset of discovery, concluding that "Tenneco is bound by this agreement." App. 27a. The agreement, stipulated to by the parties and signed as "so ordered" by the District Judge, provided that all discovery materials were "deemed" confidential unless the providing party designated otherwise.[18] Such orders are increasingly common—indeed, routine in large and complex litigation.[19] This

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[18] Paragraph five of the agreement provided that a party wishing to disclose the contents of subject documents may seek consent from the opposing party, and that such consent "shall not be unreasonably withheld." If consent is not granted, the agreement specified that the requesting party may move the court for an order permitting disclosure—the course followed by Tenneco. App. 84a-85a.

[19] Judge Becker noted in 1981 that "[w]e are unaware of any case in the past half-dozen years of even a modicum of complexity where

Court has not yet considered the effect of such orders on the "good cause" requirement of Rule 26(c), and the lower courts have adopted sharply conflicting approaches, both before and after *Seattle Times*.[20]

The court in this case assumed that the stipulated umbrella order changed the good cause requirement, shifting the burden to Tenneco to justify disclosure, rather than leaving the burden on Kern to justify barring disclosure of specific documents. It thus upheld a prior restraint barring Tenneco from disclosing the documents, in the face of an undisturbed finding that Kern had failed to demonstrate good cause why disclosure should not be permitted. App. 29a, 48a. There is apparently some support for such an approach.[21]

Most courts, however, recognize that the party resisting disclosure continues to bear the burden of establishing "good cause," even if the documents in question are subject to an umbrella protective order. For example, the

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an umbrella protective order * * * has not been agreed to by the parties and approved by the court." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). *See Manual for Complex Litigation* § 21.431 (2d ed. 1986); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 9 (1983) (umbrella protective orders "have become the norm in many areas of federal practice").

[20] The agreement in this case nowhere stated that it was entered into by the parties or ordered by the court for good cause shown.

[21] *See, e.g., GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976); *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y. 1972); *Oklahoma Hospital Ass'n* v. *Oklahoma Publishing Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (rejecting, without good cause showing, nonparty publisher's request for access to documents produced under stipulated protective order), *cert. denied*, 473 U.S. 905 (1985); *Martindell* v. *IT&T*, 594 F.2d 291 (2d Cir. 1979); *id.* at 298 (Medina, J., concurring); *cf. American Tel. & Tel. Co.* v. *Grady*, 594 F.2d 594 (7th Cir. 1978) (nonparty movant desiring access to protected documents bears higher burden where parties agreed to order), *cert. denied*, 440 U.S. 971 (1979).

Eleventh Circuit recently emphasized that "[u]nder the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party." *In re Alexander Grant*, 820 F.2d at 356. The Third Circuit has noted that "any other conclusion would turn Rule 26(c) on its head," ruling that the umbrella order must as a threshold matter be based on a showing of good cause, and that the party opposing disclosure thereafter has "the burden of proof in justifying the protective order with respect to * * * documents" the other party wishes to disclose. *Cipollone I*, 785 F.2d at 1122.

In *Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the trial judge placed a seal on the entire record in the case, barring one of the parties—the FTC—from disclosing information contained in court documents. The Sixth Circuit reversed, concluding that "the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public." *Id.* at 1176. The court vacated the seal order, concluding that "the natural desire of parties to shield prejudicial information contained in judicial records" did not justify secrecy. *Id.* at 1180.

The Seventh Circuit has similarly refused to give effect to an umbrella protective order when there was no good cause to block disclosure of specific documents. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). In that case, as here, a protective order was "agreed to by the parties and entered by the district court," but the Court of Appeals nonetheless upheld the District Court's decision to permit disclosure of documents. *Id.* at 1310-16. The appellate court noted that "good cause" for the protective order was never shown—as the District Court in the present case ex-

pressly found—and that in the absence of such a showing disclosure was required. *Id.* at 1311.

Contrary to the District Court in this case, other trial judges have recognized that umbrella protective orders cannot shift the burden of showing good cause under Rule 26(c). *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 101 F.R.D. 34, 44 (C.D. Cal. 1984) ("To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right"). The District Court in *In re "Agent Orange,"* 104 F.R.D. 559, 570 (E.D.N.Y. 1985), noted the conflict on the question, concluding that:

> *Seattle Times* tips the balance in favor of not shifting the burden. The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment * * *.[22]

The extraordinary degree to which the courts below infringed upon Tenneco's rights is highlighted by a comparison of the present case with *In re The Reporters Committee for Freedom of the Press,* 773 F.2d 1325 (D.C. Cir. 1985). A divided court in that case held that the press had no right of access to court records until after judgment in the civil case. The court's opinion, by then-Judge Scalia, emphasized that the appropriate analysis might be different "where not an implied right of access but the expressly protected right of 'freedom of speech' was at issue." *Id.* at 1332 n.5. The majority stressed that the case before it involved no closing of the courtroom, and that to the extent documents were revealed in open court they were made public, so there was

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[22] In affirming the District Court, the Second Circuit stated that it "need not reach" the burden of proof issue, because disclosure was warranted regardless of how the burden was allocated. 821 F.2d at 147.

not "the kind of outcry which closing of a trial usually excites." *Id.* at 1337. The court also noted that the protective order in question was based on an affidavit establishing good cause, and that the order specified that the party resisting disclosure continued to bear the burden of showing good cause. *Id.* at 1326.

Here, all of these caveats were ignored. This case involves not a third party's "implied right of access" but Tenneco's expressly protected right to speak and to petition the government. The trial court took the extreme step of evicting the public and closing the courtroom on the basis of the umbrella protective order, entered by stipulation of the parties without any showing of good cause, either *ab initio* or when disclosure was requested by Tenneco.

The courts themselves have noted the persistent conflict and confusion in this area.[23] Indeed, many of the

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[23] *See, e.g., Anderson* v. *Cryovac, Inc.*, 805 F.2d at 6-7 (expressly disagreeing with Third Circuit on implications of *Seattle Times*); *In re "Agent Orange,"* 104 F.R.D. at 568-569 ("A number of cases conclude that on a motion to lift a protective order the burden remains on the party seeking continued protection to show good cause for that continuation. * * * However, another line of authority exists"); *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. at 130-131 (reviewing conflicting precedent); *Sharjah Inv. Co., Ltd.* v. *P.C. Telemart, Inc.*, 107 F.R.D. 81, 83 n.1 (S.D.N.Y. 1985) (noting criticisms of *GAF* and concluding that "[a]lthough there are many similarities between *GAF* and this case, * * * the court will not follow *GAF*"); *Cipollone I*, 785 F.2d at 1121 ("lurking dispute" over good cause); *id.* at 1118 ("unclear whether *Seattle Times* mandated a Rule 26(c) analysis without regard to the first amendment, or whether it required an analysis that included a strict least restrictive means test"); *Continental Illinois Securities Litigation*, 732 F.2d at 1309 n.11 (expressly disagreeing with D.C. Circuit reading of Supreme Court precedent); *Petroleum Products Antitrust Litigation*, 101 F.R.D. at 38 ("these decisions are conflicting with regard to the scope of the right in civil cases and whether it is based upon the common law or derives only from the Federal Rules of Civil Procedure"); *Applications of NBC*, 828 F.2d 340, 351 (6th Cir.

leading cases have been decided by sharply divided panels.[24] The question presented is of continuing practical importance in the handling of complex litigation. As one judge noted, it is "one of the most difficult and vexatious issues judges confront in managing complex litigation—the access and First Amendment rights of litigants and the public in connection with the large quantity of documents that is marked confidential pursuant to a protective order such as is entered to facilitate discovery in virtually every complex case." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. at 872.

This case provides an ideal vehicle for resolving the confusion and uncertainty evident in the lower courts. The express finding by the District Court that Kern had failed to establish good cause presents starkly the question whether such a showing is required in the case of an umbrella protective order, or if the burden has shifted to the other party to show cause for disclosure. There is no

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1987) (Ryan, J., dissenting) ("Some courts appeared to ignore or distinguish *Seattle Times* * * *. Other circuits appear to have followed the apparent mandate of *Seattle Times*").

[24] *See, e.g., Continental Illinois Securities Litigation*, 732 F.2d at 1320 (majority recognizes right to disclose records submitted under an umbrella protective order; Pell, J., dissents: "The phrase 'under seal' would seem to me to be a term of art, a closed door to public dissemination"); *In re Alexander Grant*, 820 F.2d at 358 (majority enforces protective order upon finding good cause; Clark, J., dissents: there was no "consideration by the district court of the public right of access. To the contrary, in this case, the parties, including the public entities, stipulated to the consent order"); *In re Reporters Committee*, 773 F.2d at 1342, 1347 (Wright, J., dissenting, describing majority opinion as "[c]ontrary to the view of other United States Courts of Appeals" and stating, "I find myself in agreement with those Courts of Appeals that have found that the First Amendment provides a presumptive right of contemporaneous access to materials admitted into evidence in a civil proceeding"); *Cipollone II*, 822 F.2d at 347-349 (Garth, J., dissenting, on ground that District Court failed to enter express findings on "good cause").

confusion on that finding; the District Court entered it when barring disclosure before trial, and affirmed it in finally granting disclosure after decision. App. 29a, 48a. Nor is this case complicated by questions of third party access; the holding "falls directly within the text of the constitutional provision" concerning Tenneco's "expressly protected right of 'freedom of speech.'" *In re Reporters Committee*, 773 F.2d at 1332 n.5. There is no issue of potential abuse of the discovery process. Tenneco did not even seek to disclose the "smoking gun" documents publicly, but only to turn them over to the responsible federal agency, DOE, and Kern conceded that DOE would keep the documents confidential. App. 25a. The extent of the District Court's prior restraint is also starkly presented, with the extreme step of evicting the public and closing the courtroom. And there is no doubt about the practical effects of the court's action: as soon as Tenneco was able to disclose the documents to DOE, that agency entered a Proposed Order finding, in direct contrast to the District Court ruling, that Kern had violated the entitlements program.

C. The Decision Below Violates Public Policy

The District Court, in effect, allowed its good offices to become involved in a coverup. Only a court order prevented Tenneco from doing its public duty and passing on to DOE documents establishing that Kern had committed fraud on that agency. Every day of delay in disclosing the information allowed the concealment of the fraud from DOE to be perpetuated. The result was not only the denial of Tenneco's rights but a direct contravention of the public policy requiring each citizen promptly to inform the Government when it is being defrauded. A logical extension of the ruling below would mean, for example, that while two parties litigated over responsibility for a tax payment, one of the parties could be prevented from revealing to IRS uncontradicted evidence that the other had cheated on the very taxes at issue.

Public policy commands a different view. It must be that no court, absent the most dire circumstances, can prevent a party to a lawsuit from reporting to the United States Government demonstrated facts showing that the Government is being defrauded. This was not a case, after all, where the Government already possessed the relevant information and could, through its own vast resources, obtain the documents itself;[25] where the evidence was given under Fifth Amendment assumptions that it would *not* be turned over to the Government;[26] or where civil discovery was being used illicitly to obtain information for governmental purposes.[27] Here, totally unbeknownst to the Government, evidence of fraud appeared in the record of a case to which it was not a party, and even the fact of fraud could not be transmitted to the Government, although the protective order had never been designed to anticipate and foreclose such disclosure. Nor were these inadvertent, technical exceedances of some arcane set of principles. These were deliberate violations of serious and specific laws and regulations with which this long-operative and experienced oil refiner was thoroughly familiar.

This Court should resolve the conflict and confusion over this subject and hold that courts are not free to enforce protective agreements that violate public policy.[28] Under circumstances like these, a litigant "may make any lawful use of the information which comes to light during this proceeding."[29] Indeed, he has an obligation to do so, and no court should stand in his way.

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[25] *Cf. GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. at 132; *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. at 44.

[26] *Cf. Valentin* v. *Richardson*, 110 F.R.D. 622, 628 (D. Mass. 1986).

[27] *Cf. Essex Wire Corp.* v. *Eastern Electric Sales Co.*, 48 F.R.D. 308, 312 (E.D. Pa. 1969).

[28] *See W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 766 (1983).

[29] *Essex Wire Corp.*, 48 F.R.D. at 312.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6674; 87-5743

D.C. Nos. CV-81-3253-LEW; CV-81-6875

KERN OIL & REFINING CO.,
Plaintiff/Counter-Defendant/Appellee,

v.

TENNECO OIL COMPANY,
Defendant/Counter-Claimant/Appellant.

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted
December 10, 1987—Pasadena, California

Filed March 7, 1988

Before: Joseph T. Sneed and Harry Pregerson, Circuit Judges, and William A. Ingram,* District Judge

Opinion by Judge Sneed

James R. Martin, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendant/counter-claimant/appellant.

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* Honorable William A. Ingram, United States District Judge, Northern District of California, sitting by designation.

Richard E. Sherwood, O'Melveny & Myers, Los Angeles, California, for the plaintiff/counter-defendant/appellee.

OPINION

SNEED, Circuit Judge:

Tenneco Oil Company appeals from a district court judgment awarding $32 million in damages, interest, and attorneys' fees to Kern Oil & Refining Company for Tenneco's breach of contract and fraud. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Kern Oil & Refining Company (Kern) is a crude oil refiner whose refinery is located in Bakersfield, California. Kern has no crude oil production of its own and therefore must acquire from others the crude it runs through its refinery. Tenneco Oil Company (Tenneco) is an "integrated" oil company with crude production in California and elsewhere, a refinery in Louisiana, and marketing facilities around the country.

In October 1975, Kern and Tenneco agreed that Kern would purchase oil from Tenneco's fields in Yowlumne, California. As Tenneco brought new Yowlumne fields into production, it sold most of that oil to Kern as well. In May 1977, Kern and Tenneco entered into a contract that formally committed Tenneco to sell Kern all crude produced by Yowlumne properties from which Kern was already purchasing crude.[1] The trial court found that at about the same time, "Kern and Tenneco orally agreed that Tenneco would sell to Kern, under the terms of the May 1977 contract, crude from all Yowlumne properties coming into production after May 1977." Findings of Fact and Conclusions of Law, Excerpt of Record (E.R.) at 263.

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[1] Kern and Tenneco agreed that Texas law would govern disputes as to this and subsequent contracts between them.

Circumstances changed in the spring of 1978. Tenneco then learned that a pipeline would soon be open which could transport Tenneco's Yowlumne crude across the Rockies. From east of the Rockies, the oil could be easily traded for crude supply for Tenneco's Louisiana refinery. The court found that "Tenneco wanted to keep for itself the Yowlumne crude that it had agreed to sell to Kern." E.R. at 265. Tenneco faced two obstacles in attempting to keep the Yowlumne oil for itself.

The first obstacle was a practical one pertaining to Tenneco's access to the new pipeline. Tenneco's only way to the new pipeline was through a small Texaco pipeline, to which Tenneco did not have access. Kern, however, did have a contractual right to use the Texaco pipeline. Therefore, Tenneco proposed to Kern that Kern transport Tenneco's oil through the Texaco pipeline. This proposal also brought into focus the second obstacle—Kern's contractual and regulatory claims to Tenneco's Yowlumne oil. Because at the time of this proposal Tenneco's Yowlumne fields were producing more oil than Kern could refine, it did not meet with a flat rejection. Kern argued at trial that Tenneco met its concerns by fraudulently promising Kern that Tenneco would not leave Kern without a sufficient supply for Kern's refinery. Relying on that promise, and believing that it was not jeopardizing its own supply, Kern agreed in July 1978 to transport some of Tenneco's Yowlumne crude through the Texaco pipeline. Tenneco's interpretation of the July 1978 contract substantially differs from Kern's. Tenneco argued at trial that the May 1977 contract already gave Kern title to Tenneco's Yowlumne oil, and that the July 1978 contract was not a transportation agreement but a straight sale of some of the Yowlumne oil back to Tenneco. The district court agreed with Kern, and found that the July 1978 contract was a transportation agreement, which Tenneco fraudulently induced Kern to sign.

By January 1979, Kern was aware that Tenneco did not agree with Kern's interpretation of the May 1977

and July 1978 contracts, and did not intend to supply the Kern refinery's needs. This became of greater importance to Kern than previously because it contemplated expanding its refinery capacity. In February 1979, Kern filed a complaint with the U.S. Department of Energy alleging that Tenneco had violated federal regulations. In the same month, Kern and Tenneco replaced the July 1978 agreement with an explicit transportation agreement, "fulfilling the same function and serving the same purpose as the July 1978 agreement." E.R. at 269. The February 1979 agreement was not intended to affect any claims either party might have under the earlier agreements. It remained in effect until 1981.

Tenneco's conduct did not damage Kern until April 1979, when Kern completed the expansion of its refinery. From April 1979 through November 1980, Kern would have processed nearly two million barrels of the Yowlumne crude that Tenneco failed to deliver. As a result, it lost nearly $17 million in profit.

In July 1981, five months after the filing by Kern of a suit against Tenneco alleging that Tenneco overcharged Kern under the May 1977 contract, Kern filed a complaint against Tenneco in the Central District of California alleging violations of federal regulations. In December 1982, Kern filed a complaint based on the same acts and alleging contractual breaches. In 1983, the district court consolidated the two latter complaints. The overcharge case proceeded separately.

This case was tried in December 1985 and January 1986. In November 1986, the court entered judgment for Kern and awarded it some $32 million in damages, interest, and attorneys' fees, including sanctions under Federal Rule of Civil Procedure 11. The court held that by failing to sell Kern all of the oil produced by the Yowlumne fields in question, Tenneco violated the Mandatory Petroleum Allocation Regulations, 10 C.F.R. Pt. 211 (1987), and breached the May 1977 contract. E.R. at

276-85. In addition, the court held that Tenneco had committed fraud and misrepresentation in convincing Kern to sign the July 1978 contract. E.R. at 285-86.

Tenneco appealed the decision on the regulatory cause of action to the Temporary Emergency Court of Appeals and the decision on the contractual causes of action to this court.

II.

JURISDICTION

The district court had diversity jurisdiction under 28 U.S.C. § 1332 (1982). This court's jurisdiction rests on 28 U.S.C. § 1291 (1982).

III.

DISCUSSION

Tenneco presents numerous arguments. Their descriptive designations, which this opinion will employ, are as follows:

A. Absence of Jurisdiction of District Court to Enter Findings of Fact and Conclusions of Law.

B. Grounds for Dismissal of Kern's Claims.

   1. Res Judicata.

   2. Statute of Limitations.

   3. Waiver by Kern's Course of Performance.

C. Damages Erroneously Determined.

   1. 90-Day Notice Period as a Limitation on Damages.

   2. Kern's Duty to Mitigate.

   3. Evidentiary Support for Damages.

D. Prejudgment Interest Not Allowable.

E. Rule 11 Sanctions Not Proper.

We now turn to these arguments in the order set out above.

A. *Absence of Jurisdiction of District Court to Enter Findings of Fact and Conclusions of Law*

On October 10, 1986, the district judge signed his findings of fact and conclusions of law, as well as his final judgment. The latter was filed on November 5 but the findings of fact and conclusions of law were not entered until November 24, 1986. Tenneco's notice of appeal was filed on November 21, three days before the findings and conclusions were entered.

Tenneco argues that filing its notice of appeal stripped the district court of its jurisdiction to enter findings of fact and conclusions of law. It is true that filing a notice of appeal usually divests the district court of jurisdiction over the matters appealed. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982). We have, for example, refused to consider amended findings of fact and conclusions of law filed after a notice of appeal. *See Sumida v. Yumen*, 409 F.2d 654, 656-57 (9th Cir. 1969).

This divestiture of district court jurisdiction does not rest on a statute. *See Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). Rather, it is a "judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling." 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11, at 3-45 n.1 (2d ed. 1987). Tenneco's arguments would "induce needless paper shuffling." Our acceptance of Tenneco's position would not lead to a decision on the merits for Tenneco but only to a remand to the district court to file its findings and conclusions. Another appeal would

then be taken by Tenneco and next year, perhaps, we would get the case back. A better example of "needless paper shuffling" would be hard to imagine.

This case differs from *Sumida, supra*, in which the district court filed both an order and findings and conclusions, and, after the notice of appeal was filed, attempted to amend both. We properly treated the appeal as one from the earlier filed order. The appellate court is entitled to review a fixed, rather than a mobile, record. Here the district court did not attempt to move the target; it merely set one in place. It is clear to us that the findings and conclusions were intended to be filed at the same time as the final judgment. We will treat them as having been so filed.

Tenneco insists that it was deprived of its opportunity to move for amended findings and conclusions, Fed. R. Civ. P. 52(b), and to move for a new trial or an amended judgment, Fed. R. Civ. P. 59(b), (e). We are unpersuaded. Tenneco knew that the district court was preparing findings and conclusions; indeed, it had filed a lengthy memorandum in opposition to Kern's proposed findings and conclusions. Neither did it inform the court that it had not received the findings and conclusions nor did it ask for an extension of time. Doing neither of these things indicates that Tenneco was unconcerned about the deadlines for a Rule 52 or 59 motion and suffered no harm by the late filing. To remand to the district court to enable Tenneco to file still another opposition, styled a motion to amend, to the same findings and conclusions would be pointless.

Tenneco also complains of the district judge's near-complete acceptance of the findings and conclusions prepared by Kern. In *Unt v. Aerospace Corp.*, 765 F.2d 1440 (9th Cir. 1985), this court said, "We have previously disapproved of the mechanical adoption of findings and conclusions prepared by the victorious party. The verbatim adoption of findings suggested by a party is not auto-

matically objectionable, however, so long as those findings are supported by the record." *Id.* at 1444-45 (citation omitted). Tenneco points to no evidence to show that the findings and conclusions were not supported by the record.

B. *Grounds for Dismissal of Kern's Claims*

1. *Res Judicata*

We have already mentioned the regulatory case now on appeal to the Temporary Emergency Court of Appeals. In addition to that case there was yet another. In January 1981, five months before the filing in the case, Kern filed suit against Tenneco in district court, alleging that Tenneco breached the May 1977 contract by charging excessive prices. In the summer of 1984, Kern received a judgment in its favor. This court affirmed the judgment in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987). We shall refer to this, the earlier case, as the "price case," and to the case before us as the "supply case."

Tenneco now invokes res judicata and argues that the price case should bar recovery by Kern in the supply case. Kern responds that Tenneco has waived its right to invoke res judicata. We review this issue *de novo*. *See Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984).

Tenneco's principal obstacle is Fed. R. Civ. P. 8(c), which includes res judicata as an affirmative defense that must be raised in the pleadings. Tenneco admits that it did not do so. Therefore, the defense is waived. *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 n.1 (9th Cir. 1978); *Weekes v. Atlantic Nat'l Ins. Co.*, 370 F.2d 264, 271 (9th Cir. 1966); *Hernandez v. Heckler*, 621 F. Supp. 439, 442 n.2 (N.D. Cal. 1985).

It is true that we have allowed a party to raise res judicata after the initial pleadings by construing the at-

tempt as a motion to file a supplemental answer. *See Harbeson*, 746 F.2d at 520. This does not help Tenneco because we have always required that it be raised before trial. Tenneco did not raise it until after the end of the trial.[2] Moreover, Tenneco, by never objecting to separate trials of the price and supply cases,[3] cannot now object to their being split. *Restatement (Second) of Judgments* § 26(1)(a) (1982).[4]

2. *The statute of limitations*

Tenneco next invokes statutes of limitations with respect to Kern's contract and fraud claims. The contract claim is subject to a four-year statute of limitations, Tex. Bus. & Com. Code Ann. § 2.725 (Vernon 1968), and the fraud claim is subject to a three-year statute of limitations. Cal. Civ. Proc. Code § 338(4) (Deering 1972). The contract claim was filed in December 1982, and the complaint was amended to include a fraud claim in September 1983. The date of accrual of these claims is disputed. Tenneco asserts that the contract claim ac-

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[2] In July 1986, two years after the district court's decision in the price case, seven months after the court had ruled in Kern's favor on the liability issues in the supply case, and immediately after we affirmed the price case, Tenneco moved the court to dismiss Kern's claims on res judicata grounds. The court pointed out that Tenneco had not needed to wait until the appeal of the price case was decided to bring up the issue. E.R. at 1893. *See Restatement (Second) of Judgments* § 13 comment (f) (1982).

[3] From January 1983 to June 1984, the price case and the supply case were both before federal courts in the Central District of California. Tenneco never moved to consolidate them. In a hearing in October 1984, Judge Waters asked the parties why the cases had never been consolidated and a Tenneco attorney replied, "the parties both seemed to think that that was the way to proceed, the supply issues being tried here and the price issues being tried in the other case." E.R. at 1869.

[4] Because of our resolution of this issue, we need not reach Kern's argument that the price case and the supply case did not involve the same cause of action.

crued by June 1978, when the breach of contract occurred, and that the fraud claim accrued by February 1979, when Kern admittedly was aware of the fraud. Thus, as Tenneco sees it, both claims are barred by limitations.

The district court rejected those accrual dates and found that Kern's contract claim did not accrue until January 1979. We choose a different course. We conclude that under Federal Rule of Civil Procedure 15 the fraud and contract claims relate back to Kern's regulatory complaint filed in July 1981, and are therefore not barred by the statute of limitations.

Rule 15(c) states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Rule 15 allows relation back even when the original claim is itself time barred. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

Tenneco argues that the initial claim must give the defendant "fair warning that he might later be accused of some other offense than that raised in the first pleading." Tenneco is incorrect. Under Rule 15, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim. When this is so later-filed claims may relate back, even if they rest on a different legal theory than that of the first claim. *See Santana*, 686 F.2d at 739; *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1259-60 n.29 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[3], at 15-151 (2d ed. 1987).

The regulatory, contract, and fraud claims did arise out of the same factual situation. In its initial complaint,

Kern alleged that Tenneco had a obligation under DOE regulations to sell Kern all of its Yowlumne oil, and that beginning in June 1978 Tenneco breached that obligation. The complaint thus put Tenneco on notice that Kern believed it had a right to all of the Yowlumne oil. Kern's later claims only added other legal theories to support its asserted right. Thus, Kern's initial claim rests on the same conduct that supports Kern's contract and fraud claims.

3. *Waiver by Kern's Course of Performance*

Tenneco argues that Kern's course of performance under the May 1977 and July 1978 contracts dooms its claims. First, Tenneco argues that Kern's course of performance is inconsistent with the claim that Tenneco breached the May 1977 contract. Second, Tenneco argues that Kern waived its contractual rights by not notifying Tenneco of the alleged breach.

Our standard of review in matters of this kind is not simple. Our position is as follows: "When the district court's decision is based on an analysis of the contractual language and an application of the principles of contract interpretation, that decision is a matter of law and reviewable de novo. When the inquiry focuses on extrinsic evidence of related facts, however, the trial court's conclusions will not be reversed unless they are clearly erroneous." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985). The question of waiver of a contractual right is also a question of fact and subject to the clearly erroneous standard. *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983).

The district court found that from April 1979 to November 1980, Kern experienced a shortage of crude oil because Tenneco was not performing its obligations under the May 1977 contract. While it is undisputed that Tenneco delivered to Kern title to all of the Yowlumne oil, Kern received title, after July 1978, to some of the oil

solely for transportation purposes,[5] pursuant to a contract Tenneco fraudulently induced Kern to sign.[6] Therefore, when Kern experienced a shortage of oil, its sales of oil back to Tenneco under the terms of the transportation agreement neither evidenced satisfaction of Tenneco's contractual obligations nor were they a waiver of Kern's rights under the May 1977 contract. Moreover, a party's continued performance subsequent to defective performance by the other party does not waive the performing party's contractual rights as long as he complies with notice requirements. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

Tenneco argues, however, that Kern did not comply with notice requirements, and that §§ 2.208 and 2.607 of the Tex. Bus. & Com. Code (Vernon 1968) bar Kern from recovering under the contract.[7] The district court

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[5] Tenneco disputes the district court's finding that the July 1978 contract was a transportation agreement. We apply the clearly erroneous standard, because the district court looked to the parties' intent in agreeing to the contract. The finding was far from clearly erroneous.

[6] Tenneco argues that because Kern argued in its initial complaint before the Department of Energy that Tenneco coerced Kern into signing and performing under the July 1978 contract, Kern cannot now argue that it was defrauded into signing and performing under the contract. Tenneco does not attack the factual findings of the district court that "Tenneco assured Kern that Tenneco would not leave Kern without a sufficient refinery supply"; that "Tenneco's objective was eventually to take all of the Yowlumne production for itself, but it concealed that intent from Kern"; and that "Tenneco induced Kern to enter into the July 1978 agreement by falsely representing to Kern that Tenneco would continue supplying Kern with sufficient Yowlumne crude to meet Kern's refinery needs." E.R. at 266-67. These findings are not clearly erroneous, and support Kern's fraud claim. Tenneco cites no suport for the proposition that Kern's having argued a different basis for relief before a different court in a different action should defeat its claim here.

[7] Section 2.208 states:

(a) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of

found that "Kern protested Tenneco's continuing breach of supply obligations at the inception and during the entire lifespan of the February 1979 agreement." E.R. at 269.

Section 2.607's notice requirement should not be applied stringently. "As is noted in the draftsmen's comments, 'the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.' . . . [N]otice under section 2.607 need not be a specific claim for damages or an assertion of legal rights." *Eastern Air Lines*, 532 F.2d at 976; *see Reynolds Metals Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073, 1078 (5th Cir. 1985) (§ 2.607's notice requirements "are not stringent and are liberally construed by the Texas courts"); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 889 (Tex. Civ. App. 1979).[8]

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the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

. . .

(c) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Section 2.607(c) states "[w]here a tender has been accepted (1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ."

Tenneco bases its arguments primarily on § 2.607. We therefore do likewise.

[8] In addition, we note that the notice provisions of the U.C.C. were not designed for a heavily regulated, monopolistic relationship of the type that existed between Kern and Tenneco. Under the DOE regulations, the parties found themselves in a relationship that neither could easily leave. They signed and performed under the February 1979 contract, for example, at the same time that they were disputing claims against one another. We agree with the Fifth Circuit that even when two parties are effectively "married," "the

The good faith of the buyer is the "governing criterion" under the section. *Eastern Air Lines*, 532 F.2d at 977.

We hold that Kern gave Tenneco good faith notice of its contractual breach.[9] First, Kern raised the subject of Tenneco's contractual obligation before a January 1979 meeting with Tenneco. Second, Kern gave Tenneco ample notice of Tenneco's breach of its regulatory obligations. The regulatory breach was very closely related to the contractual breach. The regulations only applied because Tenneco had contracted to sell oil to Kern. Therefore, the underlying purposes of the section were accomplished: Tenneco knew that Kern was dissatisfied with its tender of goods, and the two parties had opportunity to negotiate their differences. *See Eastern Air Lines*, 532 F.2d at 976; *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 361 (5th Cir. 1980).

C. *Damages Erroneously Determined*

1. *90-day Notice Period As a Limitation of Damages*

The May 1977 contract allowed either party to terminate the contract without cause after a 90-day notice period. Tenneco argues that when a contract allows termination by either party without cause, damages for a material breach are limited to those that would accrue during the damage period.

Tenneco states this proposition too broadly. It applies when one party has ceased all performance under a contract. Under these circumstances the notice period will determine the proper amount of future damages. *See, e.g., Cottman v. State Dep't of Natural Resources*, 51

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buyer must decide whether the benefits of claiming a breach of contract outweigh the need for a close rapport with the seller." *Eastern Air Lines*, 532 F.2d at 979 n.62. But we should not expect a married party to complain as loudly as one who is free to play the field.

[9] We therefore find it unnecessary to reach Kern's argument that Tenneco waived its notice argument by not raising it below.

Md. App. 380, 443 A.2d 638 (Md. Ct. Spec. App. 1982); *Student Transit Corp. v. Board of Educ.*, 76 Ill. App. 3d 366, 395 N.E.2d 69 (1979). But the damages due to a continuing partial breach are not limited to the contract's notice period. Such a breach is not the equivalent of a cessation of all performance.

2. *Kern's Duty to Mitigate Damages*

Tenneco sold some of the Yowlumne oil (referred to as Section 33/34 oil) to third parties at uncontrolled prices. Kern had the right to purchase this oil at controlled prices, which were much lower than uncontrolled prices. Tenneco argues that if Kern had asserted its right to purchase the Section 33/34 oil at controlled prices, Tenneco would have immediately terminated the May 1977 contract, thereby greatly reducing its damages. Despite its resemblance to the refrain, "You made me love you, I didn't want to do it," Tenneco argues that the district court erred in refusing to hear its offer of proof as to this point.

"Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. A reviewing court will not reverse for an abuse of discretion unless it has a definite and firm conviction that the court below committed an error." *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986) (citation omitted).

The district court did not abuse its discretion. Kern produced evidence that Tenneco concealed Kern's right to purchase the Section 33/34 oil. As Kern points out, because it did not know it had the right to purchase the oil, it could not have protested Tenneco's selling the oil to others. It was Tenneco, not Kern, who caused Kern not to purchase Section 33/34 oil. Therefore, it was not an abuse of discretion for the district court to conclude that Tenneco's offer of proof was irrelevant.

3. *Evidentiary Support for Damages*

This court "will not disturb an award of damages on appeal unless it is clearly unsupported by the evidence." *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). Tenneco makes two contentions that the evidence does not support the award of damages. First, it argues that the Energy Department's post-trial proceeding against Kern demonstrates that some of the evidence Kern relied on in computing its damages was incorrect. Second, it argues that Kern's damage claim was speculative.[10]

Tenneco, relying on the linkage between the regulatory and this proceeding, says that it "discovered documents which demonstrated that Kern had systematically defrauded the Department of Energy by engaging in a series of illegal transactions which substantially reduced Kern's obligation under the DOE regulations to purchase 'entitlements' on price-controlled crude oil it refined." Tenneco argues that because the district court did not allow it to reveal these documents to the DOE until after the trial, the court based its award of damages on incorrect assumptions as to Kern's rights to purchase entitlements. The short answer to this argument is that the district court allowed Tenneco to produce at trial the evidence it later submitted to the DOE. Kern argued at trial that even if the Department of Energy held that Kern had acted unlawfully it would not revoke Kern's unused exception relief eligibility, which excused Kern from having to purchase entitlements for the Yowlumne oil. The district court therefore had this dispute directly before it. We cannot say that its resolution of the dispute was unsupported by the evidence.

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[10] In addition, Tenneco captions one of its headings "The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department Of Energy." Appellant's Brief at 38. Tenneco never discusses this rather eye-opening contention.

Tenneco points to Kern's statement of objections to the DOE Proposed Remedial Order that resulted from Tenneco's disclosure of documents to the DOE, and argues that Kern's statement directly contradicts the district court's findings underlying its damage award. In particular, Tenneco argues that although Kern argued to the district court, and the district court found, that Kern would have refined, not sold, the Yowlumne oil it should have received from Tenneco, E.R. at 271, Kern is now arguing before the DOE that Kern would not have processed the oil, but would have sold it. The district court heard a great deal of evidence on how Kern would have disposed of the oil it did not receive. It concluded that "[h]ad the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and not sold." E.R. at 256. That Kern is now arguing a different theory to a different tribunal certainly weakens its new position, but it does not make the district court's earlier conclusion clearly unsupported by the evidence.

Tenneco argues that because Kern's damage theories changed several times during trial, its final damage claim must have been speculative. It points to nothing else in the record to support this conclusion. While inconstancy of theories may suggest the weakness of each, a damage award is not speculative merely because of such inconstancy.

4. *Prejudgment Interest Not Allowable*

The district court awarded Kern equitable prejudgment interest at the rate of ten percent. Tenneco argues that Texas law precludes an award of equitable prejudgment interest when a statute sets the rate. It then points to Tex. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987), which provides that prejudgment interest on "accounts and contracts ascertaining the sum payable" shall be six percent.

Texas courts disagree over whether art. 5069-1.03 prevents courts from awarding equitable prejudgment interest at a higher rate than six percent on "contracts ascertaining the sum payable." Some courts have held that it does. *See, e.g., Baker Marine Corp. v. Weatherby Eng'g Co.*, 710 S.W.2d 690, 695 (Tex. Ct. App. 1986); *Missouri-Kansas-Texas RR. v. Fiberglass Insulators*, 707 S.W.2d 943, 945 (Tex. Ct. App. 1986). The district court held that Texas law allows courts to set equitable prejudgment interest rates even in cases to which art. 5069-1.03 applies. We agree.[11]

Like the district court, we rely on *Crown Central Petroleum Corp. v. National Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir. 1985). In *Crown Central*, the Fifth Circuit canvassed Texas law and concluded that "the availability of statutory prejudgment interest in no way foreclose[s] an award of equitable prejudgment interest." *Id.* at 637; *see Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 485 (Tex. 1978).[12]

Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985), instructs courts awarding pre-

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[11] We note that several Texas courts have avoided this debate by narrowly construing the scope of the phrase "contracts ascertaining the sum payable." *See, e.g., McCann v. Brown*, 725 S.W.2d 822, 825 (Tex. Ct. App. 1987); *Perry Roofing Co. v. Olcott*, 722 S.W.2d 538, 544 (Tex. Ct. App. 1986), *aff'd*, 31 Tex. S. Ct. J. 213, Feb. 13, 1988 (Tex. Feb. 10, 1988). Our resolution of this issue makes it unnecessary for us to determine whether the contract in this case is one "ascertaining the sum payable."

[12] In *Perry Roofing Co. v. Olcott*, 31 Tex. S. Ct. J., Feb. 13, 1988 (Tex. Feb. 10, 1988), the Texas Supreme Court held that courts could award prejudgment interest at the equitable, ten-percent rate in cases that involve contracts not ascertaining the sum payable—that is, contracts to which art. 5069-1.03 could not apply. The Court did not address whether courts had discretion to award equitable interest in cases inolving contracts that do ascertain a sum payable. We therefore continue to be guided by *Crown Central* and *Phillips Petroleum*.

judgment equitable interest to look at Tex. Civ. Stat. Ann. art. 5069-1.05 (Vernon 1987) to determine the interest rate.[13] Thus, the district court correctly awarded ten percent interest pursuant to *Cavnar* and art. 5069-1.05.[14]

5. *Rule 11 Sanctions Not Proper*

The district court awarded Rule 11 sanctions to Kern for "attorneys' fees and costs incurred in resisting defendant's post-trial motions heard on August 4, 1986." E.R. at 196. Tenneco made three motions on August 4: (1) to dismiss Kern's regulatory claim on the ground that the Emergency Petroleum Allocation Act of 1973 (EPAA) is unconstitutional; (2) to dismiss Kern's claims on the res judicata grounds discussed in III. B. 1 above; and (3) to unseal the trial transcript and exhibits so that Tenneco could release documents about possible Kern wrongdoing to the Department of Energy. Tenneco now argues that the district court erred in awarding sanctions to Kern for these motions.

The underlying facts the district court relied upon in making its determination are not in dispute. We therefore review *de novo* the district court's legal conclusions about the applicability of Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

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[13] *Cavnar* is a tort case, but its reasoning as to interest rates applies to all equitable interest cases. *See Crown Central*, 768 F.2d at 638; *McCann*, 725 S.W.2d at 825-26.

[14] Tenneco argues that any legislative attempt to impose a higher interest rate on parties to a contract after the parties have entered the contract would be unconstitutional under the Supreme Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). It argues further that this court should hold that the Texas Supreme Court is similarly prevented from imposing new interest rates for contract damages after the parties agreed to the contract. Tenneco does not dispute Kern's contention that Tenneco did not raise this issue below. We therefore decline to review it. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

The EPAA, under which the regulations in question in Kern's regulatory claim were promulgated, includes a legislative veto provision. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court declared the legislative veto unconstitutional. The Temporary Emergency Court of Appeals (TECA) has held that the EPAA is constitutional on two separate grounds: (1) the legislative veto provision is severable from the rest of the act; and (2) *Chadha* does not apply retroactively to the act. *See, e.g., United States v. Exxon Corp.*, 773 F.2d 1240 (T.E.C.A. 1985), *cert. denied*, 474 U.S. 1105 (1986).

In its August 1986 motion, Tenneco rejected TECA's position and argued that the EPAA was unconstitutional because the legislative veto could not be severed from the rest of the statute. It argued that, although the TECA had not changed its position or been overruled on the question of severability, the question was open because the Supreme Court had just granted certiorari in *Alaska Airlines, Inc. v. Brock*, 106 S. Ct. 1259 (1986). We need not reach the question whether the grant of certiorari in *Alaska Airlines*, a case that did not involve the EPAA, would justify Tenneco's petitioning the district court to disregard the position of the TECA. Tenneco's motion did not discuss, or even mention, TECA's alternative holding that the EPAA could stand on retroactivity grounds. This Tenneco should not have done. The trial court's award of Rule 11 sanctions for this motion was justified because the motion, by ignoring a portion of existing law, was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11.

Tenneco's res judicata arguments before the district court are identical to its res judicata arguments before this court, and have been discussed. The arguments do not support Tenneco's position. Rule 11 sanctions were justified because Tenneco had acquiesced to the claim splitting for nearly four years before it made the motion.

The trial court granted Tenneco's request to unseal the trial transcript. It therefore seems unlikely, to say the least, that the court also awarded sanctions against Tenneco for making the motion. Unfortunately, however, the court's order refers only to the motions of August 4, and does not specify which motions it covers. E.R. at 196. Nevertheless, after the court awarded Kern sanctions, Kern did not ask for attorneys' fees for time spent defending this motion. Because Tenneco did not have to pay sanctions in the form of fees for making this motion, the district court's imprecision in specifying the motions for which sanctions were appropriate becomes moot.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6674, 87-5743

KERN OIL & REFINING CO.,
Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,
Defendant-Appellant.

[Filed May 19, 1988]

Before: SNEED and PREGERSON, Circuit Judges, and INGRAM*, District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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* Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A88-74

TENNECO OIL CO.,

Applicant

v.

KERN OIL and REFINING CO.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 16, 1988.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 3rd day of August, 1988.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW(Gx)
CV 82-6875 LEW(Gx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Sept. 6, 1985]

ORDER RE TENNECO'S MOTION
FOR DISCLOSURE OF DOCUMENTS

On May 10, 1985, this Court heard Tenneco's motion to disclose to the Department of Energy ("DOE") certain documents produced by Kern during discovery. Dissemination of these documents was limited by a broad stipulated protective order issued February 1, 1984. By its

motion, Tenneco sought to remove these documents from the scope of that order.

Following oral argument, this Court issued an order requiring Tenneco to specify each document which it desired to disclose. Kern was then to "provide a specific showing of good cause pursuant to Rule 26(c) of the Federal Rules of Civil Procedure as to why those documents identified by Tenneco should be protected from disclosure." Tenneco was given an opportunity to oppose Kern's showing, and the matter was to stand submitted as of that time.

On June 3, 1985, Tenneco filed under seal copies of those documents sought to be disclosed. On June 14, Kern filed a document entitled "Supplemental Memorandum of Kern Oil & Refining Co. in Opposition to Tenneco Oil Company's Motion for Disclosure of Documents." Contrary to this Court's order, Kern elected not to make its showing of good cause. The reason for this was stated by Kern as follows:

> Kern does not here address the confidential nature of the documents identified in Tenneco's supplemental memorandum because the risk of prejudicial disclosure of that information to Kern's competitors, suppliers and customers has been reduced by Tenneco's change of strategy in now seeking to disclose those documents *only* to the government. Kern concedes that it could probably prevail upon the DOE not to disclose the documents to the public. By so conceding, however, Kern does not abandon its previous position that the documents contain confidential commercial information.

Supplemental Memorandum of Kern Oil & Refining Co. in Opposition to Tenneco Oil Company's Motion for Disclosure of Documents (hereinafter "Kern's Supplemental Memo"), p. 1 (Emphasis in original). Although no supporting authority is cited, Kern apparently has con-

cluded that Rule 26(c) provides no grounds for protecting confidential commercial information if, in fact, that information will not reach the commercial public. The Court expresses no view on this conclusion.

Having occupied the position that a Rule 26(c) showing was of no assistance to it, Kern returned to the substance of the underlying motion. It argued that Tenneco's "change of strategy" brought to bear a line of decisions holding that "a party which has received documents in the course of discovery in a lawsuit with the understanding that they were to be used solely for litigation in that action cannot voluntarily disclose those documents to an agency of the Government for purposes of the agency's investigation of the party which produced the discovery." Kern's Supplemental Memorandum, p. 2. The leading case in this line is *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976). On June 19, Tenneco filed its own Supplemental Memorandum noting Kern's failure to present any showing of good cause but addressing the new arguments raised.

Kern's most recent filing is somewhat puzzling. This Court has always been under the impression that Tenneco sought to disclose the documents in question only to the DOE. Tenneco states that this is, in fact, the case. Kern cites nothing to support its claim that Tenneco somewhere changed its strategy. This Court, however, sees no reason to penalize Kern for its prior confusion and will thus treat its Supplemental Memorandum as a motion for reconsideration.

The Court has reviewed the cases cited by Kern, in particular the *GAF* opinion. Given the particular facts of the instant case, the relevant holding of this line of cases states that a party shall be bound by the terms of an agreement not to disclose documents produced in the course of litigation. The Court fully agrees with this. Here, the parties have agreed by stipulation that confidential commercial information produced in discovery

shall not be disclosed. Tenneco is bound by this agreement.

Kern shall be given one final opportunity within seven days from the filing of this order, to make its showing that the disputed documents do contain such information. It is not relevant to this showing that the document will never reach the public. If the information contained in the documents is still commercially confidential, Tenneco shall be barred from disclosing it. Tenneco shall have ten days from the date of Kern's submission to file its opposition, if any. The matter will stand submitted as of that time.

IT IS SO ORDERED.

DATED: 6 Sep. 85

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW (Gx)
CV 82-6875 LEW (Gx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Oct. 11, 1985]

ORDER RE TENNECO'S MOTION
FOR DISCLOSURE OF DOCUMENTS

On September 6, 1985, this Court issued an order directing Kern Oil & Refining Company and Tenneco Oil Company to file briefs addressing the issue of whether the documents Tenneco seeks to turn over to the Department of Energy contain confidential information. The

Court since then has received and read Kern's Second and Third Supplemental Memoranda and Tenneco's replies thereto. Having considered those papers and all exhibits thereto in addition to all prior briefing on this motion, this Court hereby finds:

That the protective order entered into by the parties and signed by this Court contemplated that all documents discovered in the course of this litigation be presumed confidential and be used only for the purposes of this litigation;

That the documents which Tenneco seeks to disclose are documents containing the type of confidential commercial information which the protective order sought to keep private;

That Tenneco's expressed reason for disclosing said documents is to present them to the Department of Energy for the purpose of causing that agency to review an earlier action and order thereon which order, Tenneco asserts, was the result of fraud perpetrated on DOE by Kern;

That Tenneco was not a party to the proceedings involving Kern before the DOE; and

That DOE is not a party to the suit now in issue before this Court;

While Kern has failed to demonstrate good cause why the disclosure of Exhibits B, D, G, E (apart from those documents listed in Exhibit B to Tenneco's Second Supplemental Memorandum) and F (as revised) should not be permitted, the procedure now suggested by Tenneco can only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved. The questions raised are better resolved within the scope of the present litigation and parties.

Therefore, IT IS HEREBY ORDERED that Tenneco's motion for disclosure of documents is DENIED.

IT IS SO ORDERED.

DATED: October 11, 1985

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LAUGHLIN E. WATERS, Judge Presiding

No. CV 81-3253-LEW (Kx)
No. CV 82-6875-LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

vs.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

vs.

KERN OIL & REFINING CO.,
Counter-Defendant.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Wednesday, December 18, 1985

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Official Court Reporter
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[8B-3] Los Angeles, California;

Wednesday, December 18, 1985; 9:00 A.M.

* * * *

THE COURT: Please be seated.

I'm going to make a few comments, and then I'll give you the essence of my ruling. These comments that I'm going to make are not going to be definitive, nor are they going to be complete in all particulars. So I put that caveat in because on another occasion, I did make some comments when I ruled from the bench, and the briefs, then, came back saying that I hadn't discussed this, and I hadn't discussed that. Therefore, whatever arguments flowed from it. So I don't want anybody to get the impression that this short time that I'm going to take will address every question that's been raised.

The first comment is about the performance of counsel in this case, and I applaud you both, both sides, I guess, I should say here. It's not often that we have cases as vigorously and professionally and competently advocated on both sides as we've had here, and I think both sides at least are in agreement on the proposition that everything that can be briefed has been briefed, and thoroughly, and imaginatively, and creatively as well as with a high degree of professionalism. From my own part, I'm appreciative of that. By the same token, by the time I finish my remarks, [8B-4] both sides won't necessarily be appreciative of what I say, but we do have to come to a point of decision, and that's the purpose of this forum.

I commented at the outset of trial, that much of this case would be determined upon the credibility of witnesses, and I renew that observation. I do bear in mind, and it's understandable that the witnesses who have testified here, if they possess one thing that's common, it's a bias on behalf of their respective positions, and that's understood and that's acceptable. Over a period of time, why, the shadings of the bias become somewhat more marked, and I was impressed by that fact as I listened to each side call the people they desired to have testify.

Some witnesses, I think, testified partly from a lack of knowledge. Some of them testified given their respective

position with as much body English as they could, and I had trouble with the integrity and objectivity of some witnesses more so than others.

I will comment back in regard to the performance of the attorneys, again, that as has been pointed out here, some points were addressed by one side and not addressed by the other and vice versa. So we have the scene really of a war being fought, but the combatants are on somewhat different battlefields, and I have to try to bring this together and reach a decision on that which I think is [8B-5] appropriate in light of all of the circumstances.

As to the matter of the statute of limitations, it is my conclusion that the complaint was timely filed, that the arguments advanced by Kern in that regard are the arguments upon which I do rely. Now, there may be a different construction later on as this case proceeds, because clearly whatever happens in this court is not going to be the final step, but I think the complaint was timely filed.

As to the fundamental issues and what really happened in this case, it seems to me that the parties here started out in a companionable fashion and had entered into an agreement prior to the May 1977 agreement and had functioned effectively with each other for some period of time.

Tenneco, of course, was the producer, and Kern in part was the refiner, but, also a distributor of the oil that was produced by Tenneco. The relationship continued and became somewhat more intense during the oil glut that was referred to here, because it created problems both for Tenneco and Kern and raised the very real question as to the possible shutdown of the Yowlumne Field due to Kern's apparently expressed problem of not being able to absorb any more oil, again, in light of the glut situation.

The fortuitous event that took place, as I view it, [8B-6] was the sudden availability of the Four Cor-

ners pipeline and the reversal of the flow of the crude through that pipeline, which created the opportunity for Tenneco to suddenly provide assistance to its refinery at Chalmette. Now, Chalmette, of course, was in existence probably for some period of time prior to the existence of any agreement between these parties. Chalmette always had to be a prime concern for Tenneco, and it's very clear that this is an exceedingly complex and complicated industry, and the exchanges and interchanges that take place between all levels of the industry and the various companies, it's fast-moving, and it's detailed and extremely competitive.

Tenneco, as I view it, fastened upon this opportunity to ultimately provide additional crude for the operation of its refinery in Chalmette by taking advantage of the opportunity presented to the Four Corners pipeline. It was of necessity imposed upon Tenneco to work through Kern on that because of Kern's peculiar position in regard to the Texaco pipeline, and it was really at this point that the strain began to develop, and it was at this point, of course, that the July 1978 agreement came into place.

It is my view that the July 1978 agreement is not a true buy-sell agreement, but it was an agreement that was entered into by the parties by reason of the structure of California law as enforced by the Public Utilities [8B-7] Commission which compelled that. It was, in my view, nothing more or less than a transportation agreement.

The July 1978 agreement was later superseded by the February 1979 agreement. I do not believe that any significant rights of crude to either party as a result of the July 1978 agreement, nor do I believe that those rights, whatever they may have been, were in any way affected by the February 1979 agreement, which, as I understand the evidence, was simply a transaction or an agreement that simplified the bookkeeping between the parties.

I listened to Mr. LeDoux and his testimony as one of those individuals with which I have more trouble than some others. I have even more trouble with some of the testimony of Mr. Strader. Particularly do I have trouble with the testimony as it came out saying that Kern knew, Kern understood, these were our intentions, and we acted in accordance with a gentleman's agreement.

In an industry as big and as complicated as this, while there was attorney output or input on this matter, apparently this industry moved so rapidly that the attorneys are unable to keep up with what is actually taking place in the field, and for that reason, the document drafted in June, for example, was not signed until October, even though the parties have been acting under the compulsion of that agreement.

[8B-8] I have to look at the agreements that were prepared by Tenneco, and I do accept the argument that Tenneco knows how to draft agreements. The agreement of May 19, 1977—and I'm looking now at Exhibit A—"Crude oil from the above leases will be balanced against crude oil sold to Tenneco by Kern County Refinery up to 3,000 barrels a day."

Now, that langauge is clear, and it's unambiguous. The balancing obligation was up to that 3,000-barrel limit.

There were other agreements that were prepared by Tenneco with other parties where the language was equally clear and equally unambiguous where it said that the agreement was entered into, and it will be balanced barrel for barrel, and that was consistent with Tenneco's desire to provide additional crude for its refinery at Chalmette. But I don't believe that the May 1977 agreement entered into between these parties contemplated that, nor did it come within the contemplation of the Tenneco executives until after the Four Corners pipeline became available to them.

In regard to Kern's right to all crude from the Yowlumne Field, I think they've made a sufficient showing to establish that they have that right, including the oil from Sections 33 and 34.

Now, we've had some eloquent argument about how certain accounting procedures have taken place in regard [8B-9] particularly to make sure that those people who have a royalty interest in a particular well are properly compensated, but I think that's really aside from the point that oil from Sections 33 and 34 was comingled with other oil in Tank Farm 4, and it's my conclusion that Kern received oil from Sections 33 and 34, and while it seems to be kind of an interesting thread upon which to hang the conclusion that certain supplier-purchaser relationships flowed from that on the basis of first use, I think that is where this case goes.

So as I view it, Kern has made a sufficient showing, carried its burden, to demonstrate that they did have an agreement, that the agreement was breached by Tenneco, and Tenneco breached it because of its perceived needs for its tank farm in Chalmette, that Kern was entitled to the protections of the supplier-purchaser provisions of the appropriate regulations, and that there has been a sufficient showing of damage to Kern so that the Court must find judgment for Kern in regard to the liability phase.

Now, there has been a substantial amount of argument in regard to whether or not Kern was, in fact, damaged. That's something we're going to have to address later on. I reached no view on that at this time. I'm sure it will be an equally complicated and sophisticated presentation by both sides. I'm sure that both sides feel [8B-10] that I'm failing to address a number of very important points that you have raised, but I don't see the relationship as being really that much more complicated than I voiced here, which I suppose will buttress you in your conclusions that my approach is perhaps too simplistic.

In any event, while oil companies do have agreements and so on, I think they're all essentially very vigorous competitors with each other, and when the occasion arises, why, it's a kind of a no-quarter situation. I suspect that's what's happened here.

* * * *

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Aug. 28, 1986]

MEMORANDUM OF DECISION

These consolidated cases raise issues of breach of contract and breach of regulatory obligations by Tenneco Oil Company ("Tenneco") against Kern Oil & Refining Co. ("Kern") and damages flowing therefrom. The liability phase has been previously tried and resulted in a finding adverse to Tenneco. Specifically, the Court found that Tenneco had breached the regulatory obligations as

pleaded in count one and had breached the contract as pleaded in counts two through seven. The Court will now address the remaining issues concerning damages and whether attorneys' fees and related costs should be awarded to Kern.

In urging its view as to the proper quantum of damages, Kern changed position several times during the progress of the litigation, on each occasion asserting a greater amount due. The amounts finally settled upon by Kern, during trial of the damage phase, were not less than $16,761,639.00 as lost profits plus prejudgment interest of $12,836,980.00 on its breach of contract claim or, alternatively, $15,180,303.00 as prejudgment interest on its breach of regulatory obligation claim plus attorneys' fees and related costs incurred in prosecuting its claims for a total amount in excess of $30,000,000.00.

During the trial on the damage phase, Tenneco pleaded surprise concerning the latest projections as to the amount of damages advanced by Kern and insisted on an interruption of the trial so that it could more fully consider this latest contention and more effectively cross examine the Kern witnesses. Tenneco's request for delay was granted. Interestingly, when trial resumed, Tenneco left this area of examination virtually untouched, thus raising the inference that the requested delay was for a purpose or purposes other than those expressed to the Court.

While not addressing Kern's last damage computation directly, Tenneco raised several arguments which, if sustained, would tend to reduce the total of damages claimed. In so doing, Tenneco was in effect seeking to retry the liability phase of the trial. These arguments included the following assertions: that Kern did not have the capacity to process all of the crude available from the Yowlumne field and that, as a result, Kern did not experience a shortage of crude; that Kern's refinery was so designed

so that it could not process the high gravity crude available from the Yowlumne field without massive and very expensive redesign of Kern's refinery; that Kern would have sold excess Yowlumne crude rather than process it if available; that Kern would have incurred entitlement obligations on contract crude processed between April 1, 1979 to March 31, 1980; that Kern failed to make commercially reasonable efforts to mitigate its damages; and that damage to Kern was not reasonably foreseeable by Tenneco.

Discussion

The points addressed in this memorandum do not purport to be an exhaustive discussion of all of the issues raised during the trial, but they will be discussed for the purpose of indicating the bases of the Court's decision. Much of Tenneco's case was based on a highly selective approach of specific instances from which a general conclusion is urged. Upon analysis, however, and in light of more persuasive countervailing evidence, this selective evidence did not sustain the positions asserted by Tenneco. This had the effect of eroding the credibility of a number of the Tenneco witnesses and weakening and/or destroying the validity of their contentions. Such selective argumentation left the Court wondering, on occasion, as to what the true facts were.

As a case in point, in its challenge to the capacity of the Kern refinery to process Yowlumne crude at the rate of 21,000 BPSD (barrels per stream day), Tenneco relied heavily upon the figures showing reduced production during the start-up period of the refinery and the period of reduced production during a strike in 1980. Tenneco thus concluded that Kern did not have capacity to process the Yowlumne crude in amounts greater than 16,000 BPSD. Kern effectively rebutted this contention by more credible witnesses and through more persuasive documentation. The Court concludes that the limit on the

BPSD capacity was largely due to the failure of Tenneco to supply contracted crude from the Yowlumne field. The Court also finds that the Kern refinery had a capacity of 21,000 BPSD.

Tenneco urges that due to the design of the Kern refinery, it did not have the ability to process or to handle the higher gravity crude from the Yowlumne field. Mr. Tucker, testifying on behalf of Tenneco, attempted to correlate Kern's crude unit processing rate with API crude gravity and produced a graph to demonstrate his conclusion. The Court finds that the points on the graph adapted by Mr. Tucker were not the most valid points, that the line, therefore, was distorted and that the conclusion urged was misleading.

It is true, of course, that the Kern refinery was processing lower gravity crude, but this was due to the non-availability of Yowlumne crude. Kern testified, and the Court finds, contrary to the contentions of Tenneco, that the modifications of the Kern refinery necessary to process higher gravity crude were not significant in cost and could be readily achieved without major modification of the refinery. Had the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and not sold, so that higher quality products would have been produced in Kern's inventory.

As to the question of foreseeability on the part of Tenneco of damage to Kern, even if relevant, the Court finds that the damage was foreseeable. Tenneco operates its own refinery at Chalmette, Louisiana and thus knows of the importance of crude, both in volume and quality, to a refinery. Indeed, it was Tenneco's desire to protect its own interest in its refinery which resulted in the breach of contract with Kern.

The oil industry is highly competitive and industrial intelligence between competitors is vigorously pursued.

The manner in which Tenneco effected the diversion of Yowlumne crude from Kern and its awareness that the diversion would require "rather delicate handling" is indicative of knowledge on the part of Tenneco. "It is not necessary that the *specific* injury or *amount* of harm be foreseen, but only that a reasonable person in [defendant's] position would foresee that in the usual course of events, damages would follow from its breach." *Barnard v. Compugraphic Corp.*, 667 P.2d 117, 120 (Wash. App. 1983) (emphasis in original).

As to the argument regarding entitlement obligations, Kern has made a sufficient showing that its conduct was not violative of federal regulations and that the Department of Energy made an audit of entitlements compliance from October 1980 through January 1981 and found Kern to be in compliance.

The fact that retroactive exception was granted to Kern by the Department of Energy for the period October 1979 to March 1980 does not invalidate or modify Kern's claim for damages. Such relief was granted after due consideration by the Department of Energy, and Kern is entitled to rely upon it. Tenneco cannot now make a collateral attack on an order to which it was not a party. It must take the order as it finds it. *See Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512 (1953). Tenneco conceded, under cross-examination, that if Kern's entitlement purchase obligations would not exceed the amount of its exception relief eligibility, Kern's damage claim would not be affected.

Damages

In light of the above, Kern is entitled to damages for lost refinery profits in the amount of $16,761,639.00.

Attorneys' Fees

Kern also seeks attorneys' fees under the authority of Section 38 of the Texas Civil Procedure & Remedies Code.

Failure to award attorneys' fees in this case would unfairly disadvantage Kern to the betterment of Tenneco which deliberately embarked on this program of contract and regulatory breach. To hold otherwise would permit Tenneco to profit from its own wrongdoing.

The Court finds that Kern has complied with the requirements of the pertinent Texas statutes and that it is entitled to attorneys' fees plus related costs including attorney's fees and costs for post trial motions.

Interest

Interest is sought under the authority of *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985) for breach of contract. In *Crown Central Petroleum Corp. v. National Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir. 1985), the court stated ". . . that . . . Cavnar . . . must be read to create a judicial scheme for the award of prejudgment interest in all cases." *Id.* at 637. Under this authority, Kern is entitled to prejudgment interest in the amount of $12,836,980.00 plus additional interest computed at the rate of 10% to the date of this decision plus post judgment interest at the rate of 10% until judgment is paid, all interest to be compounded.

Kern also urges interest on the alternative basis in the amount of $15,180,303.00 on the breach of regulation claim. This interest is computed on the basis of the Department of Energy's use of the prime rate or by the provisions of 28 U.S.C. 1961 (the federal post judgment interest statute). In the circumstances of this case and in the appropriate exercise of discretion and consistent with the determination made in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, Case No. 81-0791-R, interest is awarded to Kern on this alternative basis in the amount of $15,180,303.00 plus such additional interest as may accrue until date of payment of the award herein based on T-bill investment rates in effect from time to time.

Conclusion

As earlier indicated, these comments are not intended to be exhaustive of all issues raised by the parties hereto, but are designed to summarize some of the bases for the Court's decision.

Counsel for Kern are directed to prepare findings of fact and conclusions of law on all material issues involved and are further directed to prepare a judgment in accordance with this memorandum of decision.

DATED: 28 Aug. 86

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
Sr. District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Sept. 25, 1986]

ORDER RE TENNECO OIL COMPANY'S MOTION FOR DISCLOSURE OF TRIAL TRANSCRIPTS AND EXHIBITS

On October 11, 1985, this Court issued an order denying Tenneco's motion for disclosure of documents obtained through discovery. On Kern's motion, and without objection from Tenneco, the Court during trial of the damages phase of this action extended the protective order filed on

January 31, 1984 to cover the trial transcript and trial exhibits. Thereafter, the documents which Tenneco sought to have disclosed prior to trial were admitted into evidence. Some six months after the conclusion of trial, but prior to entry of final judgment, Tenneco moved to vacate the order of this Court sealing the trial record. At the hearing on the motion, held on August 4, 1986, the Court took the matter under submission. Having considered the briefs filed by the parties as well as the oral argument of counsel, the Court for the reasons set forth below now grants Tenneco's motion.

Tenneco argues that it has both a First Amendment and a common law right of access to the documents at issue. Although three Circuits have found that the First Amendment does confer a right of access to the records of a civil case, *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-1179 (6th Cir. 1983); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-1070 (3rd Cir. 1984); *In Re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-1309 (7th Cir. 1984); *but see In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1330-1341 (D.C.Cir. 1984) (First Amendment right of access, if any, does not accrue until after entry of final judgment), this issue has not been addressed by either the Ninth Circuit or the Supreme Court. The common law right of access claimed by Tenneco is however universally recognized. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-600, 98 S.Ct. 1311-1313 (1978) and *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066 (3rd Cir. 1984).

The traditional common law right of access cannot be given straightforward application in this case because it is being asserted by a party to the litigation which already has access to the documents at issue. What Tenneco seeks by its motion is not access to the documents, but rather vacation of an order which prohibits dissemi-

nation of the documents. Tenneco has failed to cite a case which establishes a common law right to disseminate documents which are the subject of a protective order.

Although the Court finds that Tenneco's common law right of access has not been violated, it is not necessary to reach the constitutional claims raised by Tenneco because Tenneco is entitled to relief on other non-constitutional grounds. Given the present posture of this case, the Court now finds that there is no good reason to continue to extend the protective order to cover the trial transcripts and trial exhibits. Because this matter has now been tried, presentation by Tenneco of the documents at issue to the DOE will not delay proceedings before this Court. Moreover, when ruling on Tenneco's original motion for disclosure, this Court found that Kern had failed to demonstrate good cause as to why the documents should remain under seal. The Court now reaffirms this finding. The documents at issue relate to certain spot transactions entered into by Kern with suppliers and exchange partners more than five years ago. Kern's argument that this information can be used to Kern's detriment by its competitors is unpersuasive, especially in light of Kern's recent concession that all other information contained in the trial record is not confidential. Kern's Memorandum of Points and Authorities in Opposition to Tenneco's Motion for Disclosure of Trial Transcripts and Exhibits at p. 8; *see In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C.Cir. 1985). There being no good cause for the maintenance of the protective orders, those orders are vacated insofar as they pertain to trial exhibits received into evidence and to the trial transcript. *Tavoulares v. Washington Post Co.*, 737 F.2d 1170, 1172-1173 (D.C.Cir. 1984). However, in order to allow Kern an opportunity to seek review of today's ruling by the Ninth Circuit, this order is not to become operative until October 3, 1986.

Until that time, Tenneco remains bound by the previously entered protective orders.

IT IS SO ORDERED.

Dated: September 25, 1986

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
Sr. United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. 81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Entered Nov. 5, 1986]

ORDER AND JUDGMENT

This action having come on regularly for trial commencing December 3, 1985, the Honorable Laughlin E. Waters, Judge, presiding, and the claims presented to the Court having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Judgment is granted in favor of plaintiff Kern Oil & Refining Co. on the First, Second, Third, Fourth, Fifth,

Sixth and Seventh Clauses of Action of the Consolidated Amended Complaint.

(a) Plaintiff is to recover damages from defendant Tenneco Oil Company in the sum of $16,751,639.00.

(b) Pursuant to Texas law, plaintiff is to recover $———— from defendant for attorneys' fees and costs incurred by plaintiff in prosecuting its breach of contract claims, plus those attorneys' fees and costs it incurred in connection with its regulatory, misrepresentation and fraud claims and its defenses against defendant's counterclaims, to the extent those legal services and costs cannot be distinguished from legal services rendered and costs incurred in prosecution of the breach of contract claims.

(c) Pursuant to Texas law and Fed. R. Civ. P. 11, plaintiff is to recover $———— from defendant for attorneys' fees and costs incurred in resisting defendant's post-trial motions heard on August 4, 1986.

(d) Plaintiff is directed to move pursuant to Local Rule 16.10 for a hearing to determine the amount of attorneys' fees and costs to be awarded under (b) and (c) above, and upon such determination, those amounts shall form part of this judgment.

(e) Plaintiff is to recover from defendant pre-judgment interest in the amount of $15,180,303.00, plus additional prejudgment interest in the amount of $————, as is accrued on the amount described in (a) above from January 15, 1986 until date of this judgment, computed in accordance with 28 U.S.C. § 1961.

(f) Pursuant to Fed. R. Civ. P. 54(d), plaintiff is to recover $———— for its costs of action from defendant.

(g) Plaintiff is to recover postjudgment interest as is accrued on the amounts described in ¶ 1(a), (b), (c), (e) and (f) above and ¶ 2(c) below from the date of this judgment until payment, computed in accordance with 28 U.S.C. § 1961.

2. Judgment is granted in favor of counter-defendant Kern Oil & Refining Co. on the Fourth Counterclaim.

(a) Counter-claimant Tenneco Oil Company is to take nothing on the Fourth Counterclaim.

(b) The Fourth Counterclaim is hereby dismissed on the merits.

(c) Pursuant to Fed. R. Civ. P. 54(d), counter-defendant is to recover $———— for its costs of action from counterclaimant.

3. Judgment has heretofore been entered in favor of counter-defendant on all other Counterclaims, and counter-claimant is to take nothing on any counterclaim in this consolidated action.

4. There is no just reason for delay in allowing this Judgment to be appealed, and the Clerk of this Court is hereby directed, pursuant to Fed. R. Civ. Proc. 54(b), to enter final judgment forthwith as to the claims referred to herein in accordance with the terms hereof.

DATED: 10 Oct., 1986

/s/ Laughlin E. Waters
THE HONORABLE LAUGHLIN E. WATERS
United States District Court Judge

Submitted September 5, 1986 by:

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

/s/ Suzanne F. Duff
SUZANNE F. DUFF

Attorneys for Plaintiff
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Kern Oil & Refining Co.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. 81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Filed Nov. 21, 1986]

FILED UNDER SEAL PURSUANT
TO PROTECTIVE ORDER OF THE COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL

This matter having come on for bench trial commencing December 3, 1985, the Honorable Laughlin E.

Waters presiding, and the Court having considered the Memoranda of Contentions of Fact and Law, the Pre-Trial Conference Order, the Amendment to Pre-Trial Conference Order, the Trial and Post Trial Briefs, the testimony, exhibits and argument presented at trial, and the papers and arguments presented in connection with Tenneco's post-trial motions to dismiss Kern's causes of action,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. FINDINGS OF FACT

1. To the extent these Findings of Fact are deemed Conclusions of Law, they are incorporated into the Conclusions of Law that follow.

2. All stipulations of material fact contained in Paragraph 5 of the Pre-Trial Conference Order and the Amendment to Pre-Trial Conference Order are incorporated herein. All stipulations of fact in Paragraph 5 of the February 29, 1984 Pre-Trial Conference Order in Case No. CV 81-0791, Ex. 263, that are relevant to this litigation are incorporated herein. All Findings of Fact in the July 27, 1984 Findings of Fact and Conclusions of Law After Trial in Case No. CV 81-0791, Ex. 264, that are relevant to this litigation are incorporated herein.

3. Myriad factual disputes were aired during the course of trial herein. The resolution of these disputes turns on the credibility of witnesses. Tenneco's case was based on a highly selective approach of specific instances from which a general conclusion was urged. Kern presented more persuasive countervailing evidence. Tenneco's selective evidence did not sustain the positions it asserted, and the credibility of a number of Tenneco witnesses was eroded.

4. Kern is a small "independent" crude oil refiner whose only refinery is located in Bakersfield, California.

Because Kern has no crude production of its own, it must acquire from others all crude to be run in its refinery. Kern's profitability depends on the continuous availability of sufficient volumes of "light" crude to enable Kern to produce high value products and to run its refinery at optimal capacity. Kern frequently engages in sales (including reciprocal sales) and exchanges of crude in order to reduce transportation costs and obtain the most profitable supply of crude for its refinery.

5. Tenneco is a larger "integrated" oil company with substantial crude production in California and elsewhere, a refinery in Chalmette, Louisiana, and marketing facilities in various parts of the country.

6. Tenneco first sold crude from its Yowlumne, California field to Kern in 1975 pursuant to an October 1975 Tenneco-drafted contract, Ex. 1. As additional Yowlumne properties came into production after 1975, Tenneco sold the bulk of that crude to Kern. In June 1976 the parties executed a second Tenneco-drafted contract, Ex. 2, formally committing Tenneco to sell Kern all crude from the Tenneco properties from which Kern was by then purchasing crude. Thereafter, as additional Yowlumne properties came into production, Tenneco again sold that new production to Kern. In May 1977 the parties entered into a new contract, Ex. 6, again drafted by Tenneco, replacing their earlier contracts and formally committing Tenneco to sell Kern all crude produced from the properties listed in Exhibit A to that contract (which included all Tenneco properties from which Kern was by then purchasing crude). The May 1977 contract contained no specific termination date; it was terminable by either party on 90 days notice. Tenneco did not terminate that contract until August 1980, effective November 30, 1980.

7. At or about the time of entering into the May 1977 contract, Kern and Tenneco orally agreed that Tenneco would sell to Kern, under the terms of the May 1977 con-

tract, crude from all Yowlumne properties coming into production after May 1977. Subsequent Tenneco invoices to Kern for such Yowlumne crude production identified it as being sold pursuant to the May 1977 contract.

8. At no time did Kern represent to Tenneco that Kern would refrain from asserting a regulatory "supplier/purchaser" claim against Tenneco under 10 C.F.R. 211.63. Tenneco could have drafted a clause in the May 1977 contract attempting to waive its regulatory supply obligations, such as appears in contemporaneous contracts between Tenneco and others, *e.g.*, Exs. 19, 26, but Tenneco did not do so, and no waiver exists in the contract or elsewhere.

9. In entering into the May 1977 contract, Tenneco and Kern agreed and understood that all of Tenneco's sales to Kern beyond 3,000 barrels per day were to be outright sales, and the May 1977 contract so states clearly and unambiguously. Moreover, because the parties specifically agreed in the contract to "balance" Tenneco's sales only up to 3,000 barrels per day and because other Tenneco contracts with third parties specifically provided for balancing when it was so intended, it is clear that Kern and Tenneco did not contemplate balancing Tenneco's sales to Kern beyond 3,000 barrels per day. Nor did Tenneco and Kern intend that Tenneco's unmatched sales over 3,000 barrels per day would be temporary, or that they would be conditional in any respect, or that Kern would merely be Tenneco's marketing agent for crude in excess of 3,000 barrels per day.

10. Beginning in approximately Spring 1978, a long-standing scarcity of crude in California changed into temporary oversupply. At the same time, Tenneco's Yowlumne production increased substantially, to a point at which it exceeded Kern's refinery needs. Tenneco relied almost completely on Kern to absorb Tenneco's Yowlumne production so as to avoid "shutting in" the Yowlumne field.

11. In Spring 1978 Tenneco learned that the Four Corners Pipe Line ("FCPL") would become operational in June 1978 for movement of crude eastward, thus providing the first opportunity physically to transport Yowlumne crude from California to east of the Rockies, from where it could readily be traded for crude supply for Tenneco's Chalmette, Louisiana refinery. Tenneco wanted to keep for itself the Yowlumne crude that it had agreed to sell to Kern. Kern, at that time, did not need all the Tenneco Yowlumne crude for Kern's refinery.

12. Tenneco did not suggest to Kern that the May 1977 contract be amended or terminated so as to reduce or eliminate Tenneco's sales of Yowlumne crude to Kern: Tenneco knew that Kern would not have given up its rights to the crude, and Tenneco needed Kern's cooperation to move the crude out of the Yowlumne field. The Yowlumne crude could be moved from the field to the FCPL only through a pipeline owned by Texaco. Kern had contractual rights to move crude through the Texaco pipeline pursuant to a transportation service agreement between Kern and Texaco, but Tenneco did not. Under the terms of the agreement, Tenneco crude could be transported through the Texaco pipeline only if title was transferred from Tenneco to Kern to Texaco (and then back from Texaco to Kern to Tenneco at the end of the pipeline).

13. Instead of revealing its true intent to reduce and eventually eliminate Yowlumne crude sales to Kern, Tenneco suggested that they enter into an agreement whereby Kern would move approximately 4,500 barrels per day of Tenneco's surplus Yowlumne crude (*i.e.*, crude not needed for Kern's refinery) for Tenneco from the field to the FCPL. Tenneco drafted this July 1978 agreement, Ex. 14, structuring it as a "sale" from Kern to Tenneco at the end of the Texaco pipeline. (Tenneco was already giving Kern title to the crude at the beginning of the pipeline under the May 1977 contract). With the

initial passing of title from Tenneco to Kern under the May 1977 contract, then the Kern-Texaco-Kern pipeline transfers of title, and then the passing of title back to Tenneco under the July 1978 agreement, Tenneco was able to transport its own crude back to itself at a point where it could move that crude through the FCPL and then trade it for supply at Tenneco's Louisiana refinery. The price Tenneco paid Kern at the end of the Texaco pipeline was precisely the same as the price Kern had paid Tenneco at the beginning of that pipeline plus Kern's gathering and transportation costs. The July 1978 agreement was a transportation service arrangement, not a bona fide sale from Kern to Tenneco.

14. At the time of entering into the July 1978 agreement, Tenneco assured Kern that Tenneco would not leave Kern without a sufficient refinery supply, and, based on Tenneco's assurances, Kern understood that the transportation arrangement would be limited to surplus Yowlumne crude Kern could not use. Tenneco's objective was eventually to take all of the Yowlumne production for itself, but it concealed that intent from Kern. Tenneco deliberately embarked on a program of contractual and regulatory breach to protect its own interests at the expense of Kern.

15. Tenneco induced Kern to enter into the July 1978 agreement by falsely representing to Kern that Tenneco would continue supplying Kern with sufficient Yowlumne crude to meet Kern's refinery needs. Tenneco acted in bad faith toward Kern, capitalizing upon the circumstances of the crude oil glut and the opening of the Four Corners Pipeline for its own purposes, in intentional derogation of Kern's rights.

16. At all relevant times, Tenneco was fully aware of Kern's refinery expansion plans and its dependency on Yowlumne crude for refinery supply. Despite this knowledge, Tenneco took for itself increasing amounts of the

Yowlumne crude it should have sold to Kern and made numerous direct sales of that crude to third parties. Over the course of Fall 1978, as Tenneco diverted more and more Yowlumne crude from Kern, Kern became concerned about its refinery supply and complained to Tenneco.

17. Although Kern did not sign the July 1978 agreement until October 1978, after the point when Kern began to become concerned about its refinery supply, execution of the contract was, in Kern's eyes, a required formality reflecting an agreement it had entered into months earlier. Kern's acquiescence in the July 1978 agreement was not intended to and did not waive any of Kern's rights to quantities of Yowlumne crude sufficient for Kern's refinery.

18. In early January 1979, at Kern's request, a meeting was held with Tenneco in which Kern insisted on its rights to the Yowlumne crude. Tenneco stated at the meeting that it would look into the matter and did not then, or earlier, definitively refuse to honor its supply obligations. Only in mid-January 1979 did it become clear to Kern that Tenneco did not intend to supply Kern's refinery needs.

19. In early February 1979 Kern filed a complaint with the United States Department of Energy ("DOE"), Ex. 71, alleging that Tenneco had violated the supplier/purchaser regulations. The DOE subsequently began remedial proceedings against Tenneco and, on May 24, 1979, ordered Tenneco to sell 7,000 barrels per day of crude to Kern. That order was rescinded on technical grounds on November 6, 1979, but the DOE remedial proceeding continued until mid-1981, when it was terminated by consent order between Tenneco and the DOE.

20. Tenneco sold Kern 7,000 barrels per day from May 24, 1979 through mid-January 1980, not in reliance on any representations by Kern to the DOE, but because

it was compelled to do so by the DOE order. Tenneco suffered no detriment from these sales because they reduced its liability to Kern in this lawsuit.

21. In February 1979 Tenneco and Kern replaced the July 1978 agreement with another transportation service agreement, Ex. 46, again drafted by Tenneco, this time cast as a straightforward exchange, not a "sale," of crude, but fulfilling the same function and serving the same purpose as the July 1978 agreement. By that time, both parties were aware of each other's position, and they intended that no significant rights of either party were to be affected by the February 1979 agreement. Kern's acquiescence in the February 1979 agreement was not intended to and did not waive any of Kern's claims against Tenneco. Kern protested Tenneco's continuing breach of supply obligations at the inception and during the entire lifespan of the February 1979 agreement. The February 1979 agreement remained in effect until 1981.

22. Between May 1977 and November 1980, Tenneco sold Kern some, but not all, crude from the Yowlumne properties identified in Exhibit A to the May 1977 contract. It also sold Kern some, but not all, crude from Yowlumne properties not listed in Exhibit A (Bennett, Bradford, Unit A, and Sections 4, 4A and 5), and Tenneco's invoices to Kern for that crude stated that it was sold "per contract of May 19, 1977."

23. The properties included in "Section 33" and "Section 34" (Westland Unit, Wishon Unit, Louden, Russell, Newmark, McMahon, Scott-Smith Unit, Johnson Unit, Coretto Estate, and Hooker) are part of the Yowlumne field. Tenneco commingled crude from Sections 33 and 34 in tanks with crude from other properties and sold Kern some of that commingled crude, but did not identify any of it as coming from Section 33 or 34; rather, Tenneco identified it on invoices to Kern as crude from other Yowlumne properties. As a result, Kern was unaware that Tenneco was in fact selling Kern any crude from Section

33 or 34, and that it had thereby acquired regulatory rights to Section 33 or 34 crude. Therefore, Kern could not and did not waive its rights to Section 33 or 34 crude oil.

24. Tenneco was obligated to sell Kern the crude produced from Sections 33 and 34, Section 10, Texaco Section 14 and Texaco Section 15A. That crude bore the DOE classification of "newly discovered" crude because those properties were not in production prior to 1979. There were no entitlement costs associated with refining that crude because of the DOE classification.

25. Although Tenneco continued to sell Kern some crude, Tenneco withheld substantial amounts of Yowlumne crude from Kern over the course of 1978, 1979 and 1980. But Tenneco's conduct did not damage Kern until April 1979, when Kern's refinery expansion was completed.

26. From April 1979 through November 1980, Kern experienced a crude shortage directly attributable to Tenneco. Kern purchased other crudes as replacement for some lost Tenneco Yowlumne, but was unable to obtain (a) enough equivalent quality crude at a cost comparable to the contract price or (b) sufficient volumes of crude. Kern's attempts at mitigation caused it further loss in four months of the damage period, but Kern acted reasonably in its purchases of mitigation crude to replace the Yowlumne crude Tenneco did not deliver.

27. While Kern's refinery processed lower gravity crude during the relevant time period, this was due to the non-availability of the Tenneco Yowlumne crude, not to any physical limitations of the refinery. Any modifications necessary to process higher gravity crude could have been readily achieved without major modification or significant cost. Kern's refinery had a capacity of 21,000 BPSD and could have processed a "mix" of crude oil averaging an API gravity at least as high as 28 at the

capacity levels set forth in Kern's damage calculation. Ex. 19. The opposing evidence presented by Tenneco on this issue was not credible. For example, a graph adopted by Tenneco's expert witness, Ex. 2057, did not utilize the most valid points; thus the line on the graph was distorted and the conclusion urged was misleading. Kern's refinery could have processed the nondelivered 32 API gravity Yowlumne crude (mixed with lower gravity crudes) during the period April 1979 through November 1980. Kern's processing of the mix including the nondelivered Yowlumne would not have been limited by any physical characteristics of its refinery or by the 1980 refinery strike.

28. Kern would have processed, not sold, 1,872,314 barrels of the non-delivered Yowlumne crude from April 1979 through November 1980. It would have been sound business practice to do so. Kern had exception relief from the DOE entitlements program for the entirety of its fiscal year 1980 (April 1979 through March 1980). Accordingly, during that time, it could have and would have processed the Yowlumne crude without incurring entitlements obligations on that crude. From April 1980 through November 1980, Kern did not have exception relief and would have incurred entitlements cost on that portion of the Yowlumne crude that remained price controlled. Even without exception relief, the Yowlumne crude would have been more profitable for Kern to refine than the replacement crude it was able to purchase because (a) the Yowlumne crude, being lighter, produced more valuable products and Kern could have, and would have, produced refined products in the proportions assumed in Kern's damage calculation, and (b) the Yowlumne crude would have been priced at the contract—not uncontrolled—price; if Tenneco had billed Kern at the uncontrolled price for that crude, Kern would have paid it, by mistake, but would have been entitled to recover the overcharges because the May 1977 contract required the Yowlumne sales to be at the controlled upper tier

price. Findings of Fact and Conclusions of Law After Trial, Case No. CV 81-0791, Exhibit 264.

29. In 1981 the DOE conducted an entitlements compliance audit of Kern's crude purchase, sale, and exchange transactions, a review that included all the transactions from October 1980 through January 1981 which Tenneco now claims were illegal. The DOE was plainly satisfied from its audit that Kern was in compliance with the regulations.

30. From April 1979 through November 1980, the period of Kern's damage claim, Kern could have profitably refined 1,872,314 barrels of the Yowlumne crude that Tenneco failed to deliver to Kern. Kern lost profits of $16,761,639 between April 1, 1979 and November 30, 1980, directly attributable to Tenneco's conduct.

31. Every element of Kern's damage claim is supported by testimony and documents in the record. Kern's claim is neither speculative nor uncertain. Although Kern's damage calculation and the manner of that calculation have changed in some respects since Kern's initial damage claim, the result of such changes is a more accurate reflection of the actual damage caused to Kern by Tenneco. Kern's last changes occurred during the course of the trial, and when Tenneco pleaded surprise and insisted on an interruption of the trial so it could more fully consider Kern's latest contention and more effectively cross-examine the Kern witnesses, this Court granted the request for delay. When trial resumed, Tenneco left this area of examination virtually untouched. The Court infers that the requested delay was for a purpose or purposes other than those expressed to the Court. Tenneco never directly addressed Kern's last damage computation.

32. The DOE granted Kern exception relief from entitlement obligations during the entirety of Kern's fiscal year 1980. Even if Kern were liable for additional en-

titlements purchase obligations due to other crude transactions (not involving Tenneco), there would be no effect on Kern's damage claim because the amount of exception relief for which Kern was eligible during fiscal 1980 was large enough to cover the obligations associated with the Yowlumne crude and all other crude refined by Kern.

33. Tenneco could reasonably have foreseen that its failure to supply Yowlumne crude to Kern would damage Kern. Tenneco, itself a refiner, knows of the importance of crude, both in volume and quality, to a refinery. Tenneco freely and knowingly drafted and entered into the May 1977 contract giving Kern rights to all the rapidly increasing Yowlumne production and therefore could reasonably foresee that Kern might rely on its rights to that supply of crude to increase its refinery capacity. The manner in which Tenneco effected the diversion of Yowlumne crude from Kern and its awareness that the diversion would require "delicate handling," Ex. 106, are indicative of such knowledge on the part of Tenneco. Tenneco was also aware that Kern had received exception relief in the past, and Tenneco was itself involved in and fully cognizant of the entitlements program. Therefore it could have foreseen that Kern might be eligible for exception relief enabling Kern to process portions of the Yowlumne crude without paying entitlements costs.

34. Kern was denied the opportunity to invest or earn interest on its lost profits between April 1979 and the present time, a period of high inflation.

35. On October 22, 1985 Kern made written demand upon Tenneco for payment of its contractual claim. Tenneco did not satisfy that claim.

36. On June 25, 1981 Kern received a copy of a letter dated June 22, 1981, in which the DOE's special counsel urged termination of all remedial administrative proceedings against Tenneco in light of a consent order between Tenneco and the DOE, and suggested that Kern seek

judicial relief. Six days later, on July 1, 1981, Kern filed its complaint in federal court based on the supplier/purchaser regulations, No. CV 81-3253. Kern filed its breach of contract claim, No. CV 82-6875, on December 28, 1982, and a consolidated amended complaint including causes of action for fraud and misrepresentation on September 30, 1983. Each of Kern's causes of action in the present consolidated litigation arises out of the same conduct, transactions and occurrences.

37. Trial here was bifurcated, with liability issues being tried in December 1985 and damage issues being tried in January 1986. The Court found for Kern on liability before proceeding to the damages phase. The arguments raised by Tenneco during the trial on damages effectively sought to retry the liability phase of the trial.

B. CONCLUSIONS OF LAW.

1. To the extent these Conclusions of Law are deemed Findings of Fact, they are incorporated into the preceding Findings of Fact.

2. All Conclusions of Law in the July 27, 1984 Findings of Fact and Conclusions of Law in Case No. CV 81-0791 that are relevant to this litigation are incorporated herein.

Breach of Regulations

3. The Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211, and the Emergency Petroleum Allocation Act of 1973 on which the regulations are based, are not unconstitutional. *United States v. Exxon Corp.*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 106 S. Ct. 892 (1986); *Exxon Corp. v. United States Department of Energy*, 744 F.2d 98 (TECA), *cert. denied*, 105 S. Ct. 576 (1984); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA), *cert. denied*, 105 S. Ct. 1973 (1984).

4. Tenneco's sales of Yowlumne crude to Kern pursuant to the October 1975 contract and Tenneco's sales of

other Yowlumne crude to Kern after January 1, 1976, including sales of crude from Sections 33 and 34, established a regulatory supply obligation in Tenneco to sell all crude from those Yowlumne properties to Kern. 10 C.F.R. § 211.63.

5. Kern did not waive its regulatory supplier/purchaser rights at the time of entering into the May 1977 contract or at any other time. A small independent refiner cannot waive in advance its right to continued crude oil supplies unless it does so in writing and unless the parties agree to a specific termination date. 10 C.F.R. § 211.63(d); *Arizona Fuels Corporation*, 6 Energy Mgmt. (CCH) ¶ 56,472 (August 13, 1979); *Giant Industries, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,535 (January 6, 1981). Neither of these conditions occurred here.

6. The July 1978 agreement was a transportation service agreement in which Kern, "incident to providing a service to [Tenneco], . . . obtain[ed] title to the crude oil . . ., subsequently transferr[ed] title . . . back to [Tenneco], and charge[d] a fee for the service." 10 C.F.R. § 212.82. It created no regulatory supply obligation from Kern to Tenneco. *See* 10 C.F.R. §§ 211.63, 212.82; *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980).

7. The intent of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211, was to protect small independent refiners (such as Kern) against the interruption of their crude supplies by major integrated oil companies (such as Tenneco) during the energy shortage, and to ensure that integrated oil companies owning or controlling crude oil production could not use that control to restructure crude distribution in their own interests at the expense of the historic purchasers of the crude. H.R. Conf. Rep. No. 93-628, 93d Cong. 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2688, 2689; *Cibro*

Petroleum Products, Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520 (N.D.N.Y. 1985), *aff'd*, No. 2-47 (TECA July 10, 1986); *Basin, Inc. v. Federal Energy Administration*, 552 F.2d 931 (TECA 1977), *cert. denied*, 434 U.S. 821 (1977). Because the aim of the July 1978 agreement was to transfer Tenneco crude back to Tenneco, the original supplier and an integrated oil company, to the detriment of Kern, the historical purchaser and a small independent refiner, it did not create a supply obligation in Kern. Any interpretation to the contrary would directly contravene the intent of the allocation program. *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co.*, 6 Energy Mgmt. (CCH) ¶ 56,301 (June 28, 1976).

8. Because the July 1978 agreement was a transportation service agreement, it did not satisfy or diminish Tenneco's regulatory supply obligations and Kern's acquiescence to that agreement did not waive, terminate or modify Tenneco's obligations to Kern. *See* 10 C.F.R. §§ 211.63, 212.82; *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co., supra*; *State of Alaska*, 6 Energy Mgmt. (CCH) ¶ 56,344 (April 27, 1977).

9. If the July 1978 agreement had been a true "sales" agreement and created a regulatory supply obligation from Kern to Tenneco, then that obligation ceased when the parties terminated the July 1978 agreement and replaced it with the February 1979 transportation agreement. The February 1979 agreement superseded the July 1978 agreement.

10. The February 1979 agreement was a transportation service arrangement under 10 C.F.R. § 212.82 and created no regulatory supply obligations in either party. *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co., supra.*

11. The February 1979 agreement had no effect on Tenneco's regulatory supply obligations to Kern. *See J &W Refining Co.*, [1975-76 Transfer Binder] Energy Mgmt. (CCH) ¶ 80,602 (Mar. 19, 1976).

12. Tenneco, by failing to sell to Kern all of the crude from each Yowlumne property identified in the October 1975 contract and each Yowlume property from which Tenneco thereafter sold crude to Kern, including Sections 33 and 34, violated § 211.63 of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.63.

13. Kern was injured by Tenneco's violation of 10 C.F.R. § 211.63.

14. Section 210 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, gives Kern the right to bring a private action against Tenneco for violation of 10 C.F.R. § 211.63.

15. Kern's regulatory claim is not barred by the applicable 3-year statute of limitations. Claims under the allocation regulations do not accrue until the defendant commits an act that injures the plaintiff. *See, e.g., Oerther v. Pennzoil Co.*, 763 F.2d 420 (TECA 1985); *Siegel Oil Co. v. Gulf Oil Corp.*, 701 F.2d 149 (TECA 1983). Kern was not injured by Tenneco's conduct until April 1979; hence its July 1, 1981 complaint in Case No. CV 81-3253 was filed on a timely basis. Even if Kern had been injured earlier than April 1979, throughout 1978 Tenneco made numerous sales of crude to various third parties and each month took ever increasing amounts of crude for itself, and each of these wrongful acts gave rise to a new cause of action. *Johnson Oil Co. v. United States Department of Energy*, 690 F.2d 191 (TECA 1982). Finally, even if Kern's complaint had been filed late, the limitations period is deemed equitably tolled here because Kern reasonably and in good faith sought administrative relief within a month after having discovered Tenneco's true intentions and filed its com-

plaint here six days after receiving notice that the remedial administrative action against Tenneco was to be terminated. *See Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 191 Cal. Rptr. 681 (1983); *Burnett v. New York Central Railroad*, 390 U.S. 424 (1965).

16. This Court finds for Kern, and against Tenneco, on the First Cause of Action.

Breach of Contract

17. Where the parties have stipulated to the law that shall control their contractual dispute, that stipulation will be honored. Pursuant to the terms of the May 1977 contract, Texas law governs the breach of contract claims.

18. The May 1977 contract unambiguously obligated Tenneco to sell outright to Kern all production from the Yowlumne properties specified in Exhibit A to that contract. The parties' contemporaneous oral agreement, which was consistent with their prior course of dealing, modified the May 1977 contract and obligated Tenneco also to sell Kern all crude from Yowlumne properties coming into production after the execution of that contract. The statute of frauds is satisfied because the modification is documented by Tenneco's invoices stating that sales from newly producing properties were "per contract of May 19, 1977." Moreover, because of Judge Real's findings in Case No. CV 81-0791 and Tenneco's stipulation in that case regarding the oral agreement, Tenneco is collaterally estopped from relitigating the oral modification issue. *See United States v. Mendoza*, 464 U.S. 154 (1984).

19. The relationship between Tenneco and Kern established under the May 1977 contract was that of seller and buyer, not that of principal and agent. *See Johnson v. Owens*, 629 S.W.2d 873 (Tex. Civ. App. 1982).

20. Tenneco's obligation to sell all its Yowlumne crude to Kern was unconditional. If Tenneco's intent was to

the contrary, it never informed Kern of that intent, and unexpressed intent will not be given effect to vary the terms of the contract. *American Refining Co. v. Sims Oil Co.*, 282 S.W. 894 (Tex. Civ. App. 1926). Moreover, Judge Real's findings in Case No. CV 81-0791 collaterally estop Tenneco from relitigating whether it was obligated to sell Kern volumes of crude in excess of the volume of Kern's deliveries to Tenneco east of the Rockies and whether sales in excess of those deliveries were intended to be only temporary.

21. Because the July 1978 agreement was entered into for the sole purpose of facilitating Tenneco's transportation of surplus Yowlumne crude through the Texaco pipeline back to itself, it did not establish a contractual obligation on Kern's part to sell Yowlumne crude to Tenneco.

22. By entering into the July 1978 agreement, Kern did not waive or modify its rights under the May 1977 agreement, and the oral modification of that agreement, to receive all Tenneco Yowlumne crude. Waiver and modification require a voluntary relinquishment of a known right, as well as acts, words or conduct manifesting an unequivocal intention to abandon that right. *See Bodovsky v. Texoma National Bank of Sherman*, 584 S.W.2d 868 (Tex. Civ. App. 1979). Kern, by agreeing to a transportation arrangement for surplus crude, did not knowingly or voluntarily give up its contractual right to purchase Tenneco Yowlumne crude needed for its refinery. Moreover, even if Kern had waived rights established pursuant to the May 1977 contract by entering into the July 1978 agreement, any such waiver was retracted in early January 1979 when Kern insisted that Tenneco henceforth honor its supply obligations. U.C.C. § 2-209(5); *Hart v. Simms*, 702 F.2d 574 (5th Cir. 1983).

23. The February 1979 agreement terminated and replaced the July 1978 agreement, but did not terminate, replace or affect the May 1977 contract. Kern, by enter-

ing into the February 1979 agreement, did not expressly or impliedly waive its rights under the May 1977 contract or modify that contract in any respect. *See Bodovsky, supra,* 584 S.W.2d at 873; *Jordan Drilling Co. v. Starr,* 232 S.W.2d 149, 159-60 (Tex. Civ. App. 1949); *Butler, Williams & Jones v. Goodrich,* 306 S.W.2d 798 (Tex. Civ. App. 1957).

24. Tenneco breached the May 1977 contract by failing to sell all its Yowlumne crude production to Kern.

25. Implied in the May 1977 contract is a convenant of good faith and fair dealing that imposed upon Tenneco a duty to deal in good faith with Kern and to do nothing that would deprive Kern of the benefits of the contract. U.C.C. §§ 1-203, 1-201(19), 2-103(1)(b). When Tenneco deliberately decided to give priority to its own refinery needs over Kern's contractual rights, Tenneco disregarded its duty of good faith and thereby breached the covenant implied in the contract.

26. Kern was injured by Tenneco's breach of contract.

27. Kern's causes of action for breach of contract are not barred by *res judicata.* Kern did not impermissibly split its causes of action. Restatement (Second) of Judgments § 26(1)(a) (1982); *see Harbeson v. Parke Davis, Inc.,* 746 F.2d 517, 520-21 (9th Cir. 1984).

28. Kern's causes of action for breach of contract are not barred by the applicable 4-year statute of limitations. Kern's causes of action did not accrue until mid-January 1979 at the earliest.

29. Even if Tenneco had breached the May 1977 contract prior to January 1979, Kern filed its complaint for breach of federal regulations on July 1, 1981. Because both the regulatory and contractual causes of action arise out of precisely the same conduct, transactions and occurrences, Kern's breach of contract claims relate back to July 1, 1981 and are not barred by the statute of limita-

tions. Fed. R. Civ. P. 15(c); *see In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370 (N.D. Ill. 1985). Kern's claims for breach of contract would relate back to July 1, 1981 even if Kern's regulatory complaint were time barred. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982).

30. Even if Tenneco's first breach occurred prior to January 1979, Kern was entitled to elect to continue performance under the contract and to treat Tenneco's improper performance as a partial breach, thus retaining a claim for damages caused by subsequent breaches. *Cities Service Helex, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976); *Airco, Inc. v. Niagra Mohawk Power Corp.*, 430 N.Y.S.2d 179 (App. Div. 1980). Tenneco's conduct before mid-January 1979 was not an anticipatory repudiation of the May 1977 contract since Tenneco did not, until then, unequivocally and absolutely refuse to perform. *See, e.g., Mackenzie v. Farr*, 541 S.W.2d 879 (Tex. Civ. App. 1976); *Cooper v. Wildman*, 528 S.W.2d 80 (Tex. Civ. App. 1975). Moreover, repudiation is not actionable unless it substantially impairs the value of the contract, U.C.C. § 2-610; *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973). Since Kern was not damaged by Tenneco's actions until April 1979, Tenneco's pre-1979 conduct did not substantially impair the contract's value to Kern and thus did not constitute an anticipatory repudiation.

31. This Court finds for Kern, and against Tenneco, on the Fifth, Sixth, and Seventh Causes of Action.

Fraud and Misrepresentation

32. Alternatively, if the July 1978 agreement adversely affected Kern's regulatory or contractual supply rights, then Tenneco committed fraud and misrepresentation (a) by concealing from Kern its intent to use the July 1978 agreement eventually to take all Yowlumne crude away from Kern and (b) by assuring Kern that

Kern's refinery needs would be met. Cal. Civ. Code §§ 1709, 1710.

33. Kern did not ratify or waive the fraud and misrepresentation by executing the July 1978 agreement in October 1978. The memorialization of the agreement was a mere formality without legal significance. *See Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980). When Kern executed the agreement, it had been led to believe that Tenneco would provide Kern sufficient crude for its refinery needs. Neither waiver nor modification can be implied. *See Lobdell v. Miller*, 114 Cal. App. 2d 328, 250 P.2d 357 (1952).

34. Kern's fraud and misrepresentation claims are not barred by *res judicata*. Kern did not impermissibly split its causes of action. Restatement (Second) of Judgments § 26(1)(a) (1982); *see Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520-21 (9th Cir. 1984).

35. Kern's fraud and misrepresentation claims are not barred by the applicable statutes of limitations. They relate back to July 1, 1981 because they arise out of the same conduct, transactions and occurrences as Kern's regulatory claim, Fed. R. Civ. P. 15(c), even if the latter claim was itself time-barred, *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982).

36. This Court finds for Kern, and against Tenneco, on the Second, Third, and Fourth Causes of Action.

Laches

37. None of Kern's causes of action is barred by laches because all of them are legal in nature. *See, e.g., American Insurance Co. v. First Savings & Loan Association*, 434 S.W.2d 170 (Tex. Civ. App. 1968).

Damages

38. Kern lost refinery profits because of Tenneco's breach of regulations, breach of contract, fraud and mis-

representation. Lost profits resulting from violation of the Mandatory Petroleum Allocation Regulations are recoverable under § 210(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. Lost profits resulting from breach of contract are recoverable under U.C.C. § 2-718(2)(a). Lost profits caused by fraud and misrepresentation are recoverable under U.C.C. § 2-721 and Cal. Civ. Code § 3343. *See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

39. Because Tenneco did not rely on Kern's request to the DOE for 7,000 Tenneco barrels per day and because Tenneco suffered no detriment as a consequence of that request, Kern is not estopped from claiming damages here. *See Gulbenkian v. Penn*, 252 S.W.2d 929 (Tex. 1952); *Stanley Educational Methods, Inc. v. Becker CPA Review Course, Inc.*, 536 F.2d 86 (5th Cir. 1976).

40. Kern does not have to prove foreseeability of damages to recover its lost profits on its regulatory claim. In any event, Tenneco could reasonably foresee that Kern would be damaged if Tenneco failed to sell the required amounts of Yowlumne crude to Kern. It was not necessary that Tenneco foresee the specific injury or specific amount of harm. *Barnard v. Compugraphic Corporation*, 667 P.2d 117 (Wash. App. 1983); *Dale Truck Line v. R & M Well Servicing & Drilling Co.*, 286 S.W.2d 446 (Tex. Civ. App. 1956).

41. Even though the May 1977 contract contained a 90-day termination clause, Kern's damages are not limited to those occurring within 90 days of the breach. Tenneco did not terminate the contract until November 30, 1980, and Kern's rights to damages based on breaches prior to that date survive. U.C.C. § 2-106(3).

42. Kern's damage calculation is not speculative or uncertain. Each element of it is thoroughly documented in the evidence. Damages for lost profits need not be

proved with mathematical certainty, provided an award has a rational basis in the evidence. *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983); *see Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1963). In any event, a party who breaks his contract cannot escape liability merely because it is impossible for a plaintiff to state or prove a perfect measure of damages. *Southwest Battery Corporation v. Owens*, 115 S.W.2d 1097, 1099 (Tex. 1938).

43. The burden was on Tenneco to refute Kern's prima facie evidence of its damages. *Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Company*, 602 F. Supp. 1520 (N.D.N.Y. 1985), *aff'd*, No. 2-47 (TECA July 10, 1986). Tenneco failed to meet this burden. Its evidence did not sustain the positions asserted by Tenneco, and Kern's countervailing evidence was more persuasive.

44. Evidence of the performance of Kern's refinery after the damage period is relevant and admissible to show that Kern could have processed the non-delivered Yowlumne crude. *See Louis v. Mobil Oil Corporation*, 438 F.2d 500 (8th Cir. 1971); *Multivision Northwest, Inc. v. Jerrold Electronics Corporation*, 356 F. Supp. 207 (N.D. Ga. 1972).

45. Tenneco is collaterally estopped from arguing that Kern would have had to pay any more than "upper-tier" price for any Tenneco Yowlumne crude. Judge Real's Findings of Fact and Conclusions of Law in Case No. 81-0791 establish that the May 1977 contract required Tenneco's sales to Kern beyond the first 3,000 barrels per day to be at upper-tier price.

46. Kern is entitled to rely upon the DOE grants of exception relief to Kern for the entirety of fiscal 1980. The fact that portions of those grants were retroactive does not invalidate or modify Kern's damage claim.

Tenneco must take those orders as it finds them; it cannot collaterally attack those DOE orders in this litigation. *Callanan Road Improvement Company v. United States*, 345 U.S. 507 (1953); *Adams v. Nagel*, 303 U.S. 532 (1938). Moreover, as Tenneco was not a party to the exception relief proceedings, it has no standing to attack those DOE orders.

47. This Court's order of October 11, 1985 that the protective order prohibited Tenneco from disclosing to the DOE confidential documents obtained in this litigation does not preclude Kern from relying on the DOE orders granting it exception relief.

48. Tenneco's defense regarding Kern's alleged avoidance of entitlements obligations supposedly arising from crude oil transactions with third parties is irrelevant to this litigation. Even if the DOE were to take action against Kern in connection with those transactions, it would do so in a separate remedial proceeding that would have no effect on the exception relief orders Kern relies on in its damage calculation. *See USA Petroleum Company*, 12 DOE ¶ 82,503 (1984).

49. Tenneco's accusations of illegality regarding Kern's transactions with third parties are irrelevant here for the following additional reason: even if Kern owed entitlements as a result of those transactions, the amount of exception relief for which Kern was eligible during fiscal 1980 was large enough to cover the fiscal 1980 obligations associated with all crude refined by Kern, including crude obtained in the alleged entitlements avoidance transactions. As Tenneco conceded, in such circumstances Kern's damage claim would be unaffected.

50. In any event, Kern's transactions with third parties did not violate the DOE regulations. Kern followed the regulations, 10 C.F.R. § 212.131(b), correctly transferring certifications on direct sales and retaining them when crude was exchanged. There is no evidence that anyone miscertified the crude.

51. Kern, in good faith, made commercially reasonable efforts to mitigate its damages. Although its attemps at mitigation caused it further loss in four of the twenty months of its damages, the test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective. U.C.C. § 2-712, comment 2. The rule of mitigation of damages may not be invoked by Tenneco, a contract breaker, as a basis for hypercritical examination of Kern's conduct or merely for the purpose of showing that Kern might have taken steps which seemed wiser or which would have been more advantageous to Tenneco. *S.J. Groves & Sons Company v. Warner Company*, 576 F.2d 524 (3d Cir. 1978). Consequently, Kern's damages cannot be reduced merely because its mitigation efforts in four months were unsuccessful.

52. Kern is entitled to recover from Tenneco $16,761,639 in damages for lost profits.

Attorneys' Fees

53. Under Texas law, Kern is entitled to recover its attorneys' fees and related costs incurred in prosecuting its breach of contract claim. Tex. Civ. Prac. & Remedies Code § 38 (1985). Such fees and costs also include those incurred in connection with Kern's claims for breach of regulations, misrepresentation and fraud and its defense of Tenneco's counterclaims to the extent that those claims are so inextricably bound to Kern's breach of contract claim that no distinction can be made between the legal services rendered and costs incurred. *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860 (Tex. Civ. App. 1980). Under the Texas law and Fed. R. Civ. P. 11, Kern is also entitled to recover its attorneys' fees and costs incurred in defending against Tenneco's post-trial motions heard on August 4, 1986. Pursuant to Local Rule 16.10, Kern

shall move for a hearing to determine the precise amount to be awarded pursuant to this paragraph.

Interest

54. Kern was not required to pray for prejudgment interest in its complaint. Fed. R. Civ. P. 54(c); *Crown Central Petroleum Corp. v. National Union Fire Insurance Company*, 768 F.2d 632, 638 (5th Cir. 1985).

55. Under Texas law, Kern is entitled to prejudgment interest on its breach of contract claims. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 553-54 (Tex. 1985); *Crown Central Petroleum Corp. v. National Union Fire Insurance Company*, 768 F.2d 632 (5th Cir. 1985). Texas law gives this Court discretion to base its awards of prejudgment interest on either a statutory or an equitable basis. *Larcon Petroleum, Inc. v. Autotronic Systems, Inc.*, 576 S.W.2d 873, 879 (Tex. Civ. App. 1979). In light of the high interest rates that existed between 1979 and the present date, this Court finds that Kern is entitled to prejudgment interest on an equitable basis. Accordingly, pursuant to *Cavnar* and Tex. Rev. Civ. Stat. Ann. art. 5,069-1.05 § 2, Kern is entitled to prejudgment interest in the amount of $12,836,980 (the amount due as of January 15, 1986), plus additional prejudgment interest computed at the rate of ten percent from January 15, 1986 to the date of this decision, plus post-judgment interest at the rate of 10 percent until judgment is paid, all interest to be compounded daily.

56. Kern is also entitled to, and is hereby awarded, prejudgment interest on its regulatory claim. The general federal rule is that, in the absence of a statutory provision, the award of prejudgment interest is in the discretion of the Court. *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977). No statute regulates the award of prejudgment interest on Kern's breach of regulations claim. Even though the amount of Kern's damages was

not liquidated, Kern's loss would not be fully compensated if it were confined to only the principal amount. A distinction between cases of liquidated and unliquidated damages in deciding whether to award prejudgment interest is not a sound one. *Funkhouser v. J.B. Preston Company*, 290 U.S. 163, 168-69 (1933); *Miller v. Robertson*, 266 U.S. 243, 258 (1924). The decision is one of equity and discretion in the trial court, *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408 (TECA), *cert. denied*, 464 U.S. 915 (1983); *Gulf Oil Company v. Dyke*, 734 F.2d 797, 806 (TECA 1983), *cert. denied*, 105 S. Ct. 173 (1984), and Kern is here equitably entitled to prejudgment interest on its regulatory claim. In this respect, as in all other aspects of these findings and conclusions, Tenneco should not be allowed to profit from its own wrongdoing. Interest is awarded to Kern in the amount of $15,180,303 (the amount due as of January 15, 1986), plus prejudgment interest on $16,761,639 damage award as may accrue from January 15, 1986 until date of this judgment, computed in accordance with 28 U.S.C. § 1961.

57. Kern shall be entitled to post-judgment interest, computed in accordance with 28 U.S.C. § 1961, on the damage award, all attorneys' fees and costs awarded, all prejudgment interest awarded and all costs of action awarded, from the date of this judgment until payment.

Tenneco's Fraud Counterclaim

58. A purchaser cannot by oral statement waive in advance, its regulatory right to a continuing supply of crude oil. 10 C.F.R. § 211.63(d); *see also Giant Industries, supra*; *Arizona Fuels Corporation, supra*. Kern did not represent to Tenneco that Kern would refrain from asserting a violation of regulatory supply obligations, and even if such representations had been made, there would be no effect on either Kern's regulatory or contract claims.

59. This Court finds for Kern, and against Tenneco, on Tenneco's Fourth Counterclaim.

Judgment

61. Judgment is to be entered in favor of Kern and against Tenneco on the First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action of Kern's Consolidated Second Amended Complaint and in favor of Kern against Tenneco on Tenneco's Fourth Counterclaim (Tenneco's other counterclaims having already been dismissed and/or judgment thereon having already been granted in favor of Kern). Said judgment is a final order under Fed. R. Civ. P. 54(b).

DATED 10 Oct., 1986

/s/ Laughlin E. Waters
THE HONORABLE LAUGHLIN E. WATERS
Judge, United States District Court

Submitted September 5, 1986 by:

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

/s/ Suzanne F. Duff
SUZANNE F. DUFF

Attorneys for Plaintiff and
Counter-Defendant Kern Oil &
Refining Co.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number CV 81-3253 LEW (KX)

KERN COUNTY REFINERY, INC.,
Plaintiff(s)

vs

TENNECO OIL CO.,
Defendant(s)

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that findings of fact & conclusions of law after trial in the above entitled case was entered in the docket on 11/24/86 under seal.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 11/24/86, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, CA 90071

ROBERT D. SACK
GIBSON, DUNN & CRUTCHER
9 West 57th Street
NY, NY 10019

GIBSON, DUNN & CRUTCHER
333 S. Grand Ave.
Los Angeles, CA 90071

J. MICHAEL HENNINGAN,ETC.
HENNIGAN & MERCER
611 W. 6th Street
28th Floor
Los Angeles, CA 90017

JOHN MATHIS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

LARRY L. SIMMS
1050 Connecticut Ave., N.W.
Washington, D.C. 20536

RALPH J. MAYNARD
POB 2511
Houston, TX 77001

Clerk, U.S. District Court

By /s/ [illegible]
Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nos. CV-81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

[Filed Jan. 31, 1984]

STIPULATION TO ENTRY OF PROTECTIVE ORDER

Subject to the approval of the Court, plaintiff Kern Oil & Refining Co. ("Kern") and defendant Tenneco Oil Company ("Tenneco") hereby stipulate and agree to the entry of a protective order regarding the treatment of confidential commercial information on the terms and conditions set forth below.

1. Kern and Tenneco agree that all materials provided by either party in the course of discovery in Case Nos. 81-3253 LEW (Kx) and 82-6875 LEW (Kx) ("these cases") shall be deemed to contain confidential commercial information unless specifically designated by the providing party as not containing such information.

2. All such confidential materials provided by Kern to Tenneco or by Tenneco to Kern in the course of discovery in these cases shall be retained by counsel for Kern or by counsel for Tenneco and shall not be disclosed or used by such counsel, or by Kern or Tenneco, other than in connection with these cases. For the purposes of this Order, reference to counsel for Kern and counsel for Tenneco shall mean the parties' respective attorneys of record in these cases.

3. Any such materials, copies of extracts therefrom, or information therein may be disclosed *only* in connection with the litigation of these cases and only to attorneys employed by Kern or Tenneco, to employees, consultants, or agents of Kern or Tenneco, or to witnesses in these cases.

Such materials, copies of extracts therefrom, or information therein shall not be disclosed for any purpose other than in connection with the litigation of these cases, and, except pursuant to the procedures set forth in paragraph 5, shall not be disclosed to any person or entity other than those stated above.

4. With the exception of attorneys employed by Kern or Tenneco, each person to whom disclosure is to be made shall, before disclosure is made to him or her, acknowledge in writing that he or she is familiar with the terms of this Order and that he or she agrees to be bound thereby. All such written acknowledgements shall be maintained by the attorney making the disclosure and shall be available for inspection and copying upon request by counsel for either party in these cases.

5. If an attorney for either Kern or Tenneco desires to disclose any confidential materials, copies of extracts therefrom, or information therein to any person who is not specifically authorized to have access to such materials, extracts, or information pursuant to paragraph 3,

the attorney must first disclose to whom he desires to give or disclose the materials, extracts, or information, and must obtain the written consent of the attorney for the providing party, which consent shall not be unreasonably withheld. If such written consent is not given within ten days after the request is made, the requesting party may move the Court for an order permitting the disclosure.

6. In connection with any submission made by Kern or Tenneco to the Court in these cases which contains confidential materials, the submitting party shall enclose the submission in a sealed envelope marked with the caption of the case and with the statement that confidential material under protective order is contained therein. The Clerk of the Court shall file and maintain the submission in the sealed envelope, to be opened only on direction of the Court.

7. The foregoing restrictions on disclosure and the use of confidential information shall not apply to documents and information which, at or prior to disclosure thereof, is or was public knowledge, or which becomes public knowledge as a result of publication by one having the unrestricted right to do so, or which the providing party designates as not confidential for any reason.

8. Within a reasonable time after completion of these cases, the originals and any copies of confidential material covered by this order shall be returned to the providing party or shall be destroyed, and a verified statement confirming the destruction shall be supplied by counsel for the opposite party.

9. The parties' agreement to this Order is evidenced by the signatures of counsel affixed hereto.

DATED: 1-26-84

/s/ John P. Mathis
JOHN P. MATHIS
KIRK K. VAN TINE
CHARLES B. MCDONALD
BAKER & BOTTS

DATED: 1-27-84

/s/ Elizabeth A. Grimes
R. RANDALL HUFF
ELIZABETH A. GRIMES
GIBSON, DUNN & CRUTCHER
Attorneys for Defendant
Tenneco Oil Company

DATED: 1-27-84

/s/ John P. Lenich
RICHARD E. SHERWOOD
JOHN P. LENICH
SUZANNE F. DUFF
O'MELVENY & MYERS
Attorneys for Plaintiff
Kern Oil & Refining Co.

ORDER

IT IS SO ORDERED.

DATED: 31 Jan 84

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX L

PERTINENT CONSTITUTIONAL PROVISION AND RULES

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people * * * to petition the Government for a redress of grievances."

Rule 26(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending * * * may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and

conditions as are just, order that any party or person provide or permit discovery.

Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part:

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 * * *.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *

Rule 59 of the Federal Rules of Civil Procedure provides, in pertinent part:

New Trials; Amendment of Judgments

(a) Grounds. * * * On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

APPENDIX M

RULE 28.1 STATEMENT

Tenneco Oil Company is wholly-owned by Tenneco Corporation, which is wholly-owned by Tennessee Gas Pipeline Company, which in turn is wholly-owned by Tenneco Inc. A complete listing of all subsidiaries and affiliates of Tenneco Inc. follows:

TENNECO INC. AND SUBSIDIARIES AND AFFILIATES

As of May 31, 1988

TENNECO INC. (Delaware)	
Tenneco Management Company (Delaware)	100%
Tennessee Gas Pipeline Company (Delaware)	100
Agricultural & Industrial Management, Inc. (Delaware)	100
Albright & Wilson Americas Inc. (Delaware)	100
Chemrich, Inc. (Louisiana)	100
Brake-Pro Systems Inc. (Delaware)	100
DeKoven Manufacturing Co. (Wisconsin)	100
East Tennessee Natural Gas Company (Tennessee)	100
Eastern Insurance Company Limited (Bermuda)	100
ERCO Industries Inc. (Delaware)	100
Intake Water Company (Delaware)	100
Kern River Corporation (Delaware)	100
Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Kern River Service Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Land Ventures Inc. (Delaware)	100
Lorneterm LNG Limited (Canada)	100
Midwestern Gas Marketing Company (Delaware)	100

Midwestern Gas Transmission Company (Delaware)	100%
Viking Gas Transmission Company (Delaware)	100
Monroe Auto Equipment Company (Delaware)	100
E-Z Ride Shock Absorber Company (Michigan)	100
McPherson Struct Company Inc (Delaware)	100
Monroe Argentina S.A.I.C. y F. (Argentina)	100
Monroe Auto Equipement France S.A. (France)	100
Regal Ride Shock Absorber Company (Michigan)	100
Sudinpar Holding Etablissement (Liechtenstein)	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)	98
Tenneco Automotive International Sales Corporation (Delaware)	100
Tenneco Automotive Japan Ltd. (Japan)	100
New Tenn Company (Delaware)	100
Northeastern Gas Transmission Company (Delaware)	100
Tenneco Alaska, Inc. (Delaware)	100
Tenneco China Trade Inc. (Delaware)	100
Tenneco United Company (a Texas General Partnership) (Tenneco China Trade, Inc. has 50% ownership and Indamerica International, Inc., a California corporation, has 50% ownership.)	
Tenneco Coal Company (Delaware)	100
Tenneco Communications Corporation (Delaware)	100
Tenneco Corporation (Delaware)	100
Bloor Automotive Inc. (Delaware)	100
Discoverer Services, Inc. (Delaware)	100
Blue Flame Gas Corporation (Delaware)	100
Channel Industries Gas Company (Delaware)	100
Collins Pipeline Company (Delaware)	80
Columbine Casualty Company (Colorado)	100
G & T Pipeline Company (Delaware)	100
Kern County Land Company (Delaware)	100
J. I. Case Company (Delaware)	100
The Case Company (Wisconsin)	100
Case Engine Holding Company, Inc. (Delaware)	100
Consolidated Diesel Company (North Carolina Partnership)	50
(Case Engine Holding Company, Inc. (Delaware) has 50% ownership as General Partner and Cummins Engine Holding Company, Inc. (Indiana), an unaffiliated company, has 50% ownership as General Partner)	
Consolidated Diesel, Inc. (Delaware)	100

Case Ventures Corporation (Delaware)	100%
Hay & Forage Industries (Kansas Partnership)	50
(Case Ventures Corporation (Delaware) has 50% ownership as General Partner and Hesston Ventures Corporation (Kansas), an unaffiliated company, has 50% ownership as General Partner)	
Grand Detour Plow Company (Wisconsin)	100
Kase, S.A. De C.V. (Mexico)	100
J. I. Case Argentina, S.A. (Argentina)	100
J. I. Case Credit Corporation (Wisconsin)	100
J. I. Case International, S.A. (Venezuela)	100
J. I. Case Leasing Corporation (Wisconsin)	100
J. I. Case Mfg. Company, Inc. (Wyoming)	100
J. I. Case Threshing Machine Company (Wisconsin)	100
Pryor Foundry, Inc. (Oklahoma)	100
Steiger Tractor, Inc. (Delaware)	100
Integrated Technical Systems, Inc. (North Dakota)	100
Steiger Australia Ltd. (North Dakota)	100
Steiger Financial Corp. (Pty) Ltd. (Australia)	100
Steiger Canada Ltd. (Canada)	100
Steiger Credit Company (North Dakota)	100
Steiger Credit Canada Ltd. (Canada)	100
Steiger International, Ltd. (Guam)	100
Tenneco Canada Inc. (Ontario)	100
Albright & Wilson Americas Inc. (Canada)	100
Dunville Mining Co. Limited (Alberta)	100
Electric Reduction Sales Co., Ltd. (Canada)	100
ERCO Industries of Canada Limited (Canada)	100
J. I. Case do Brasil & Cia. (Brazil)	100
Case Capital Assets Management S/C Ltda. (Brazil)	100

Monroe do Brasil Industria e Comercio Ltda. (Brazil)	100%
Monroe Auto Pecas S.A. (Brazil)	80
Productora Andina de Acidos y Derivados Ltda (Colombia)	49
Tenneco Credit Canada Corp. (Alberta)	100
Tenneco West, Inc. (Delaware)	100
Boquillas Cattle Company (Arizona)	100
Kern County Land Company, Inc. (California)	100
Tenneco Realty Development Corporation (Delaware)	100
Tenneco Arizona Property Corporation (Arizona)	100
LHC Pipeline Company (Delaware)	100
Marlin Drilling Co., Inc. (Delaware)	100
Bluefin Supply Company (Delaware)	100
Marlin International Drilling Company (Delaware)	100
Marlin Colombia Drilling Co., Inc. (Caymay Islands)	100
Marlin Colombia Drilling Co. Inc. (Delaware)	100
Marlin-West Drilling Co., Inc. (Delaware)	100
Mitchell Supreme Fuel Company (Delaware)	100
Petro-Tex Chemical Corporation (Delaware)	100
State Gas Pipeline Company (Delaware)	100
SWL Security Corp. (Texas)	100
T & M Terminal Company (Delaware)	80
TGP Corporation (Delaware)	100
THC Pipeline Company (Delaware)	100
Tenneco Automotive Retail Service Systems, Inc. (Delaware)	100
Tenneco Aviation Limited (Delaware)	100
Tenneco Credit Corporation (Delaware)	100
Counce Limited Partnership (Texas Limited Partnership) (Tenneco Credit Corporation has 95% ownership as Limited Partner and Tenneco InterAmerica Inc. has 5% ownership as General Partner)	
Counce Finance Corporation (Delaware)	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50 % ownership as Limited Partner)	
Tenneco Storage Capital Corporation (Delaware)	100

- Tenneco Cogeneration Development Company (Delaware) — 100%
- Tenneco Insurance Ventures Inc. (Delaware) — 100
- Tenneco Inc. (Nevada) — 100
- Tenneco InterAmerica Inc. (Delaware) — 100
  - Counce Limited Partnership (Texas Limited Partnership) (Tenneco InterAmerica Inc. has 5% ownership as General Partner and Tenneco Credit Corporation has 95% ownership as Limited Partner)
    - Counce Finance Corporation (Delaware) — 100
  - LIG Chemical Company (Louisiana) — 100
  - Louisiana Intrastate Gas Corporation (Louisiana) — 100
  - Newport News Shipbuilding and Dry Dock Company (Virginia) — 100
    - Asheville Industries Inc. (North Carolina) — 100
    - Greeneville Metal Manufacturing, Inc. (Virginia) — 100
    - The James River Oyster Corporation (Virginia) — 100
    - Newport News Industrial Corporation (Virginia) — 100
      - Newport News Industrial Corporation of Ohio (Ohio) — 100
    - Newport News Reactor Services, Inc. (Virginia) — 100
    - Sperry Marine Inc. (Delaware) — 100
    - Sperry Marine - Asia Inc. (Virginia) — 100
  - Packaging Corporation of America (Delaware) — 100
    - The Corinth and Counce Railroad Company (Mississippi) — 100
    - Economy Printing & Lithographing Co. (Texas) — 100
    - Alcan Ekco Limited (United Kingdom) — 50
    - A/S Haustrup-Ekco Aluminum-Emballage (Denmark) — 50
      - Plus Pack AB Svenska Haustrup-Ekco (Sweden) — 100
      - Plus Pack A/S (Norway) — 100
      - Plus Pack GmbH (Austria) — 100
      - Plus Pack GmbH (Switzerland) — 100
    - Ekco N.V. (Belgium) — 100
      - Ekco S.A.R.L. (France) — 1
    - Ekco S.A.R.L. (France) — 99
    - Middleton Brokerage Co., Inc. (California) — 100

Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan) 50%
Skogstre A/S Norway) 50
Western Packaging, Inc. (Colorado) 100
Tuscaloosa Pipeline Company (Louisiana) 100
Tenneco Minerals Company (Delaware) 100
Prometheus Minerals (Canada) Ltd. (Canada) 100
Tenneco Minerals Company of Australia, Inc. (Delaware) 100
Windy Point Minerals, Ltd. (Canada) 100
Tenneco Oil Company (Delaware) 100
Caldyne, Inc. (Delaware) 100
FC Marine Inc. (Delaware) 75
(Skips A/S Tudor owns 25%)
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Houston Oil and Minerals Corporation has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)
Greene's Propane Gas Corporation (Georgia) 100
Houston Oil & Minerals Corporation (Nevada) 100
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Houston Oil and Minerals Corporation has 74%ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)
Houston Oil & Minerals Exploration Company (Texas) 100
Houston Oil International, Inc. (Texas) 100
HOCOL, S.A. (Cayman Islands) 100
Agencias Petroleras, Ltda. (Colombia) 100
Case Poclain S.A. (France) 78
Establissement Lacroix S.A. (France) 100
Establissement L. Bouilloux S.A. (France) 98
Poclain Italiana SpA (Italy) 99
Societe Francaise Immobiliere Franim (France) 100
J. I. Case GmbH (Germany) 100

Tenneco Espana S.A. (Spain) 100%
Tenneco Oil Company of Ecuador, S.A. (Cayman Islands) 100
Tenneco Oil (Malaysia) S.A. (Cayman Islands) 100
Tenneco Petrole Gabon, S.A. (Cayman Islands) 100
Houston Oil & Minerals of Colombia, Inc. (Texas) 100
Houston Oil & Minerals of Dubai, Inc. (Texas) 100
Houston Oil & Minerals of The Netherlands, Inc. (Texas) 100
Houston Oil & Minerals of Tunisia, Inc. (Texas) 100
Houston Oil & Minerals U.K., Inc. (Texas)..... 100
LaTerre Colombia, S.A. (Cayman Islands)..... 100
Tenneco Oil of Gabon, Inc. (Texas) 100
Tenneco Oil & Minerals of UMM AL-QAIWAIN (Texas) 100
Houston Production Company (Texas) 100
Houston Royalty Company (Nevada) 100
Magrange Inc. (Texas) 100
Tenneco Oil Trading Company (Texas)..... 100
LaTerre Development Corp. (Delaware) 100
LaTerre Petroleum (U.K.), Inc. (Delaware).. 100
Mistal, Inc. (Delaware) 51
Mont Belvieu Land Company (Delaware) 100
Multistate Oil Properties, N.V. (Netherlands Antilles) 100
Operators, Inc. (Delaware) 100
Ship Channel Chemicals Company (Delaware).. 100
TENN-USS Chemicals Company (Texas General Partnership)
(Ship Channel Chemicals Company has 50% ownership as General Partner)
TENN-USS Chemicals Finance Corporation (Delaware) 50
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)
Tenneco LaTerre, Inc. (Delaware) 100
Tenneco Marine Services, Inc. (Delaware).. 100
Tenneco OCS Company, Inc. (Delaware) 100
Tenneco Oil Pipeline Company (Delaware) 100
Tenneco Retail Service Company (Delaware) .. 100

Tenneco Retail Service Company of Texas (Texas) 100%
Tenneco Storage Limited Partnership (Louisiana Limited Partnership)
(Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)
Tenneco Storage Capital Corporation (Delaware) 100
Viscosity Oil Company (Illinois) 100
Tenneco Oil Company of Nigeria (Delaware) 100
Tenneco Oil Company of Nigeria Unlimited (Nigeria) 50
Tenneco Polymers, Inc. (Delaware) 100
Tenneco Resins, Inc. (Delaware - in dissolution) 100
Tenneco Eastern Realty, Inc. (New Jersey).. 100
Tenneco Synfuels Company (Delaware) 100
Tennessee Overthrust Gas Company (Delaware).. 100
Tenngasco Corporation (Delaware) 100
Creole Gas Pipeline Corporation (Louisiana).. 100
Tenngasco Exchange Corporation (Delaware) 100
Tenngasco Gas Gathering Company (Delaware - in dissolution) 50
Tenngasco Gas Supply Company (Delaware) 100
HT Gathering Company (Texas) 50
Oasis Pipeline Company (Delaware) 20
Tenngasco Marketing Corporation (Delaware) 100
Walker Deutschland GmbH (Germany) 1
West Africa Corporation (Delaware) 100
Tenneco Oil Company of Nigeria Unlimited (Nigeria) 50
Tenneco Delta XII Gas Co. Inc. (Delaware) 100
Tenneco Energy Ltd. (Canada) 100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands) 100
Tenneco Gas Pipeline Group, Inc. (Delaware) 100
Tenneco Gas Marketing Company (Delaware) 100
Tenneco Gas Transportation Company (Delaware)... 100
Tenneco Gas Services, Inc. (Delaware) 100
Tenneco International Inc. (Delaware) 100
A B Starla-Werken (Sweden) 100
J. I. Case Sweden A.B. (Sweden) 100
Sara Gretes Cafeteria AB (Sweden) 50
Tenneco Transicol AB (Sweden) 100
Walker Nord AB (Sweden) 100
Case Belgium Inc. (Delaware) 100
Case Poclain S.A. 14

Case Traktoren GmbH (Germany)	100%
Compania de Financiacion Case, S.A. (Spain)	100
Etablissement Robert Bellanger, S.A. (France)	100
Speedy Et Cie SNC (France) Etablissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
J. I. Case (Australia) Pty., Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case S.A. (Spain)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
Marine Systems SpA (Italy)	100
Monroe Australia Pty. Limited (Australia)	100
Wylie Superannuation Pty. Ltd. (Australia)	100
Omni-Pac GmbH (Germany)	1
Omni-Pac S.A.R.L. (France)	97
Poclain do Brasil S.A. (Brazil)	100
P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (J.I. Case-Monroe-Petro-Tex-Sperry-Marine) N.V. (Belgium)	100
International Harvester Company of Belgium N.V. (Belgium)	100
Societe Anonyme Industrielle des Resines (France)	100
Speedy Inc. (Delaware)	100
Speedy Et Cie SNC (France) (Speedy Inc. has 1% ownership and Etablissement Robert Bellanger, S.A. has 99% ownership)	
Sperry Marine SARL (France)	100
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Trading Company (Delaware)	100
Tenneco Deutschland Beteiligungs GmbH (Germany)	100
Case Vibromax GmbH (Germany)	100
Case Vibromax GmbH und Co. (Germany)	2

Vibromax Australia (Pty) Ltd. (Australia)	100%
Vibromax France SARL (France)	99
Vibromax SCI (France)	99
Monroe Auto Equipment Company GmbH (Germany)	100
Omni-Pac Ekco GmbH (Germany)	100
Omni-Pac GmbH (Germany)	99
Omni-Pac ApS (Denmark)	100
Omni-Pac A.B. (Sweden)	100
Omni-Pac S.A.R.L. (France)	3
Pit-Stop Auto Services GmbH (Germany)	100
Poclain GmbH (Germany)	100
Case Poclain GmbH & Co. (Germany)	2
Chance Gesellschaft Fuer Baumachinau MbH	100
Sperry Marine GmbH (Germany)	100
Vibromax France SARL (France)	1
Vibromax SCI (France)	1
Walker Deutschland GmbH (Germany)	99
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco Holdings B.V. (Netherlands)	100
Tenneco Nederland B.V. (Netherlands)	100
Case Poclain GmbH & Co. (Germany)	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany)	100
Case Vibromax GmbH und Co. (Germany)	98
Vibromax Australia (Pty) Ltd. (Australia)	100
Sperry Marine B.V. (Netherlands)	100
Tenneco Transicol B.V. (Netherlands)	100
Tenneco Holdings Danmark A/S (Denmark)	100
Case Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
J. I. Case A/S (Denmark)	100
Lydex A/S (Denmark)	100
Sperry Marine ApS (Denmark)	100
Sperry Marine A/S (Norway)	100
Tenneco International N.V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100

Tenneco Oil Company of the Bahamas (Delaware)	100%
Tenneco Oil Company of Colombia (Delaware)	100
Tenneco Oil Norway A/S (Norway)	100
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100
J. I. Case Europe Limited (Delaware)	100
Case Credit Limited (United Kingdom)	100
International Harvester Company of Great Britain Limited (United Kingdom)	100
J. I. Case Europe Limited (a UK Company)	100
Omni-Pac U.K. Limited (United Kingdom)	100
Hartmann Fibre Limited (United Kingdom)	100
Tenneco Europe Limited Delaware)	100
Tenneco International Finance Limited (United Kingdom)	100
Case Credits Limited (United Kingdom)	100
Sperry Marine Limited (United Kingdom)	1
Tenneco International Finance BV (Netherlands)	100
Tenneco International Holdings Limited (United Kingdom)	100
Albright & Wilson Limited (United Kingdom)	100
ACC (Fertilisers) Ltd. (United Kingdom)	100
FCL Crop Protection, Ltd. (United Kingdom)	100
Robt. Stephenson & Son, Ltd. (United Kingdom)	100
The Farmers Co., Ltd. (United Kingdom)	100
Albright & Wilson A.B. (Sweden)	100
Albright & Wilson A/S (Norway)	100
Albright & Wilson Asia (H.K.) Limited (Hong Kong)	100
Albright & Wilson Pte Limited (Singapore)	100
Albright & Wilson Asia Taiwan Limited (Taiwan)	100
Albright & Wilson Asia Trading (Malaysia) Sdn Bhd (Malaysia)	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom)	100

Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom)	100%
Albright & Wilson GmbH (Austria)	100
Albright & Wilson Intertrade Ltd. (United Kingdom)	100
Albright Wilson Chemicals (PTY), Ltd. (Australia)	100
Albright & Wilson (Australia) Limited (Australia)	57
Albright & Wilson New Zealand Limited (New Zealand)	100
Albright & Wilson (Langley) Ltd. (United Kingdom)	100
Albright & Wilson (Malaysia) SDN. BHD. (Malaysia)	100
Albright & Wilson (Marchon) Pte. Limited (Singapore)	100
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)	100
Albright & Wilson (Mfg.) Ltd. (United Kingdom)	100
Albright & Wilson Oils SDN BHD (Malaysia)	100
Albright & Wilson Overseas Ltd. (United Kingdom)	100
Akulu Marchon (PTY) Ltd. (South Africa)	50
Akulu Chemicals Coast (PTY) Limited (South Africa)	100
Akulu Chemicals (PTY) Ltd. (South Africa)	100
Albright & Wilson Aps (Denmark)	100
Albright & Wilson BV (Netherlands)	100
Albright & Wilson GmbH (Germany)	100
Albright & Wilson International Finance BV (Netherlands)	100
Albright & Wilson Ireland Ltd. (Eire)	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom)	100
Ibex Ltd. (Ireland)	100
Thawpit (Ireland) Ltd. (Ireland)	100

Albright & Wilson SpA (Italy)	100%
Marchon Espanola S.A. (Spain)	100
Marchon France S.A. (France)	100
Marchon Hellas Ltd. (Greece)	100
Marchon Italiana SpA (Italy)	100
Marchon Sud SpA (Italy)	100
Polyphosphates Inc. (Philippines)	40
Albright & Wilson Pension Investments Ltd. (England)	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil)	100
Albright & Wilson Resins and Organics Limited (United Kingdom)	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom)	100
E. P. Potter & Co. Ltd. (United Kingdom)	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia)	100
Albright, Morarji and Pandit Limited (India)	39.9
Astoria Shipping & Transport Co., Ltd. (United Kingdom)	100
Butler (1843) Ltd. (United Kingdom)	50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company	
Arndale Fuels Ltd. (United Kingdom)	100
Butler Oil Products Ltd. (United Kingdom)	100
Croft Oils Limited (United Kingdom)	100
Elston Oils Limited (United Kingdom)	100
Gough Oils Limited (United Kingdom)	100
John Oils Limited (United Kingdom)	100

Cambray Ltd. (United Kingdom)	100%
Clifford Christopherson & Co., Ltd. (United Kingdom)	100
Cumbria Trading Co., Ltd. (United Kingdom)	100
Detergent Chemicals Limited (United Kingdom)	100
Electropol Ltd. (United Kingdom)	100
General Phosphates Co. Ltd. (United Kingdom)	100%
Mallison Feeds, Ltd. (United Kingdom)	100
Marchon Products, Ltd. (United Kingdom)	100
Mays Chemical Manure Co., Ltd. (United Kingdom)	100
Mortimer Investment Co. Limited (United Kingdom)	100
Proban Ltd. (United Kingdom)	100
The Scottish Chemical Co., Ltd. (United Kingdom)	100
Solway Chemicals, Ltd. (United Kingdom)	100
Tenneco Malros Ltd. (United Kingdom)	100
Tenneco Organics Ltd. (United Kingdom)	100
Compass Chemicals, Ltd. (United Kingdom)	100
Thomas Tyrer & Co. Ltd. (United Kingdom)	100
Case-Poclain Limited (United Kingdom)	100
David Brown Tractors Limited (United Kingdom)	100
David Brown Tractors (Belfast) Ltd. (United Kingdom)	100
David Brown Tractors (Ireland) Ltd. (Ireland)	100
David Brown Tractors (Retail) Ltd. (United Kingdom)	100
A. M. Exports Limited (United Kingdom)	100
Poclain Limited (United Kingdom)	100
Tractorwork, Limited (United Kingdom)	100
Harmo Industries Ltd. (United Kingdom)	100
Birmingham Filters Limited (United Kingdom)	100

Brames Limited (United Kingdom)	100%
D. P. Miller & Sons Limited (United Kingdom	100
Harmo Pressings Limited (United Kingdom)	100
Harmo Steel Co. Limited (United Kingdom)	100
Harmo Tubes Limited (United Kingdom)	100
F. Mould Limited (United Kingdom)	100
F. Mould (Silencers) Limited (United Kingdom)	100
The Harmo Engineering Co. Limited (United Kingdom)	100
J. W. Hartley (Motor Trade) Limited (United Kingdom)	100
Fisher & Mould Limited (United Kingdom)	100
Harmo Auto Services (Export) Limited (United Kingdom)	100
Harmo Auto Services Limited (United Kingdom)	100
Harmo Export Ltd. (United Kingdom)	100
Harmo Filters Limited (United Kingdom)	100
Harmo Technical Development Limited (United Kingdom)	100
Steering & Suspension Limited (United Kingdom)	100
Karobes Limited (United Kingdom)	100
Midland Trim & Equipment Ltd. (United Kingdom)	100
Houston Data Venture (U.K.) Limited (United Kingdom - in dissolution)	100
J. I. Case Company Limited (United Kingdom)	100
Monroe Auto Equipment U.K. Limited (United Kingdom)	100
Sperry Marine Limited (United Kingdom)	99
Tenneco - Walker (U.K.) Limited (United Kingdom)	100
Tenneco West Limited (United Kingdom)	100
Thompson and Stammers (Dunmow) Limited (United Kingdom) (in liquidation)	100
Tenneco United Kingdom, Inc. (Delaware)	100

Tractorwork Iberica, Inc. (Delaware)	100%
Universaltrac Beteiligungs GmbH (Germany)	100
Intertractor Viehmann GmbH & Co. (Germany)	50
Intertractor A.G. (Switzerland)	100
Intertractor America Corporation (Delaware)	100
Intertractor G.B. Ltd. (United Kingdom)	100
Intertractor Italiana S.R.L. (Italy)	100
Intertractor S.A.	100
Walker Europe, Inc. (Delaware)	100
Walker Norge A/S (Norway)	100
Tenneco LNG Inc. (Delaware)	100
Tenneco Norway LNG Inc. (Delaware)	100
Tenneco Realty, Inc. (Delaware)	100
First National Services, Inc. (Delaware)	100
Inmobiliaria Belgrado, S.A. (Mexico)	100
Ten Ten Travis Corporation (Delaware)	100
Tennchase, Inc. (Texas)	100
Tennessee Gas Building Corporation (Delaware)	100
TRI Realty, Inc. (Texas)	100
Tenneco Shale Oil Company (Delaware)	100
Tenneco SNG Inc. (Delaware)	100
Tenneco Trinidad LNG, Inc. (Delaware)	100
Tenneco Turkiye, Inc. (Delaware)	100
Tennessee Gas Marketing Company (Delaware)	100
Tennessee Gas Transmission Company (Delaware)	100
Tennessee Iroquois Gas Company (Delaware)	100
Tennessee Niagara Gas Company (Delaware)	100
Tennessee Ozark Gas Company (Delaware)	100
Tennessee Storage Company (Delaware)	100
Tennessee Trailblazer Gas Company (Delaware)	100
Walker Manufacturing Company (Delaware)	100
Walker Marketing Corporation (Wisconsin)	100